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Vol. II

TRANSCRIPT OF RECORD

(Pages 831 to 1758)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., ET AL.,
APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

FILED OCTOBER 4, 1946.

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GROVER C. SCOTT resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination (resumed).

By Mr. Marcus:

Q. Mr. Scott, would you recognize this document, Plaintiff's Exhibit 25, marked in evidence, as the agreement which you entered into with the Schines on November 30, 1938? Just glance through that (handing document to witness).

The Court: There is no question raised about the fact that this is the agreement, is there?

Mr. Marcus: Yes. That agreement does not contain any provision for Mr. Scott not to compete with the Schines in [fol. 670] Corbin, and I am going to ask him another question in a minute.

The Court: I say, the agreement itself is admitted as appears there?

Mr. Marcus: Yes.

Mr. Wright: Of course we do not know whether that is the true copy of the missing pages or not. Mr. Scott is the only one who can tell us. I suppose he can look at it and tell us. That is what he is doing now.

The Witness: What is your question, please?

By Mr. Marcus:

Q. Mr. Scott, do you recall making an affidavit in which you stated——

Mr. Rogers: We have not got the first question answered yet.

Q. Is that the agreement which you entered into with the Schines?

A. That is one of the agreements.

Q. Do you recall entering into other agreements at or around the same time with the Schines?

A. Yes, sir.

Q. In an affidavit made by you, Mr. Scott, do you recall having made the statement that you had entered into an

agreement with the Schines not to compete with the Schines in Corbin for ten years?

Mr. Rogers: One moment, First I object to that on the [fol. 671] ground that it is impeaching his witness, and, second, on the ground that an affidavit should be read in the language of the affidavit and the affidavit itself should be used.

The Court: Objection sustained.

Mr. Rogers: And on the further ground that if the affidavit relates to any agreement the agreement itself should be produced.

Mr. Wright: The agreement has been subpoenaed from you. You have not produced it.

Mr. McKay: Because there is not any such agreement.

Mr. Wright: Why don't you say so then?

Mr. Rogers: What agreement are you talking about?

The Court: Just a moment. We are wasting time. Let us proceed with the witness.

By Mr. Marcus:

Q. Mr. Scott, do you recall making any agreement with the Schines where such provision for you not to compete with the Schines in Corbin was contained?

Mr. Rogers: I object to that on the ground that the agreement speaks for itself, if there was any such agreement.

The Court: Sustained.

Mr. Rogers: This witness has already testified those were the agreements he entered into. There is no testimony [fol. 672] that he entered into other agreements.

Mr. Marcus: Yes, he has testified he did.

The Court: I have already ruled. Proceed.

Q. Mr. Scott, do you recall turning over to your son, Leon Scott, any other agreements besides these two which you had made with the Schines (handing papers to witness)?

A. All papers—all agreements that were made I did not turn over to Leon Scott because he was a partner with me in it, and it was left in his possession because when I sold out to him I left all the files in his possession.

Q. The question now is whether you recall having turned over to Leon Scott any agreements besides or in addition to these two agreements which you had made with the Schines?

The Court: Were there any other agreements?

A. There was other agreements.

The Court: All right.

Mr. Marcus: I would like to have the witness step down and put Leon Scott on the stand, your Honor.

The Court: Can we not conclude with him?

Mr. Marcus: I want to develop from Leon Scott whether or not he had such agreement, and why it has not been produced.

The Court: Do you wish to prove the contents of the agreement?

[fol. 673] Mr. Marcus: I want to lay the foundation for asking this witness what was in that agreement by showing that the agreement is not available, your Honor.

The Court: Step forward, then, Mr. Scott.

Leon Bernard Scott, a witness recalled by and on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination.

By Mr. Marcus:

Q. Mr. Scott, you have just heard your father testify that he had turned over to you agreements with the Schines other than these two agreements. Where are those agreements?

Mr. Rogers: Not agreements. He said "agreement." Look at your Exhibit 21. Aren't there three agreements?

Mr. Marcus: Yes, there are three agreements. Other than these three agreements.

Mr. Rogers: Four, I think, all told.

Mr. Marcus: No, there are just three.

Mr. Rogers: There are four agreements.

[fol. 674] Mr. Marcus: I do not see what difference that makes.

Mr. Rogers: If we are going to go into the testimony of Mr. Leon Scott we should find out whether he turned over——

Mr. Marcus: Read that question.

(Question read as follows: "Q. Mr. Scott, you have just heard your father testify that he had turned over to you agreements with the Schines other than these two agreements. Where are those agreements?")

Mr. Rogers: Mr. Marcus said, if you will notice, "two agreements." As a matter of fact there were four agreements.

The Court: By my own question I asked Mr. Scott if he referred to two, and I asked if there were any others and he said there was.

Mr. Marcus: May I withdraw that question, please?

The Court: Yes.

By Mr. Marcus:

Q. You have heard your father, Mr. Scott, testify that in addition to these four agreements that there were other agreements turned over to you by him. Now, Mr. Scott, where are those agreements?

A. I did not hear him testify to that. I heard him testify to two agreements.

[fol. 675] Q. Do you want me to put your father on the stand again?

Mr. Rogers: One moment. I object.

The Court: How many agreements did he turn over to you?

The Witness: I do not know, sir. That has been several years ago.

The Court: What did you do with those he did turn over?

The Witness: I don't know. I could possibly find them.

By Mr. Marcus:

Q. Now, Mr. Leon Scott, do these papers here represent all the agreements you could possibly find?

A. If I am not mistaken there were some agreements which you did not want. If I am not mistaken, on the papers he asked me to produce in this folder I brought up to him Saturday there were some papers he gave me back pertaining to this case that he said he did not need.

The Court: He is asking now about agreements.

The Witness: I said I think there is.

Q. Mr. Scott, do you still have that folder with you?

A. Not here. I can get it.

Mr. Marcus: Well, in that case, would the Court kindly direct Mr. Scott to get that folder and bring its contents to court?

The Court: You have those papers?

The Witness: Yes, sir.

Mr. Marcus: With the Court's permission we might allow Mr. Scott to leave and put on another witness.

The Court: All right.

[fol. 676] HUBERT B. WHITENACK, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Marcus:

Q. Mr. Whitenack, where do you reside?

A. Appalachia, Virginia.

Q. What is your occupation?

A. Motion picture projectionist at present.

Q. In what theatre in Appalachia do you hold that position?

A. Appalachian.

Q. Mr. Whitenack, during the period that Mr. Murphy operated the Viv Theatre in Corbin, were you the manager of that theatre?

A. No, sir.

Q. What position did you hold?

A. I was motion picture projectionist and assistant manager.

Q. During that period, or during any part of that period, Mr. Whitenack, did you keep a daily record in the course of business of the receipts and expenses and pictures played in that theatre?

A. Yes, I did, from January first, 1940 through May 11th.

Mr. Marcus: Will you mark this for identification, please?

[fol. 677] (Thereupon the book referred to was marked as Plaintiff's Exhibit P-26 for identification.)

Q. Mr. Whitenack, I show you Plaintiff's Exhibit P-26 marked for identification which appears and which has on the cover "The At a Glance Bookkeeping and Contract

Record for the Corbin, Kentucky, Viv Theatre," and ask you whether this is the daily record which you kept in the usual and general course of business?

A. Yes, sir.

(Mr. Marcus hands Plaintiff's Exhibit P-26 for identification to Mr. Rogers).

Q. Mr. Whitenack, do you know who were the managers of the other theatres?

Mr. Rogers: Other theatres where?

Mr. Marcus: At Corbin, Kentucky, during the period of operation by Mr. Murphy of the Viv?

The Witness: A. F. C. Mays.

Q. Was there anyone else?

A. Louis Marenbloom. Mays was there. He left about a month before we sold out, before Schines took the theatre over. He was there about five months.

Mr. Marcus: I should like to offer Plaintiff's Exhibit P-26 marked for identification in evidence.

Mr. Rogers: I object to it on the ground it has no rele-
[fol. 678] vancy, no materiality shown for the admission of this record.

Mr. Marcus: Your Honor, this record shows what pictures were played and what the expenses were, and what the receipts were. They certainly are relevant.

Mr. Rogers: How would that be relevant?

Mr. Marcus: Do you recall having brought out the matter of profit, Mr. Rogers, yesterday?

Mr. Rogers: I do.

Mr. Marcus: I think this is quite relevant.

Mr. Rogers: But this covers only a limited period from January to April, and they opened the theatre in October of 1939.

The Court: Whether this would supplement that, I don't know.

Mr. Rogers: If for that period of — alone, may it please the Court, there is no relevancy to it.

The Court: Paragraph 2, that is the one which you referred to yesterday, in the complaint. (The Court read paragraph 2 of the complaint.)

Mr. Rogers: But as of the present position of this record there is no evidence of that at all.

The Court: As I often say, all things can't come from one witness.

[fol. 679] Mr. Rogers: They certainly finished with Mr. Scott.

The Court: Objection overruled. Received.

(The book previously marked as Plaintiff's Exhibit P-26 for identification was received in evidence.)

Q. Do you know whether or not the Viv Theatre, during the time it was operated by Mr. Murphy, made a profit?

Mr. Rogers: May it please the Court, I object to that on the ground this witness has not been qualified.

Mr. Marcus: He stated he was assistant manager.

The Court: Was he there from October?

Q. Were you there from October?

A. Yes, sir.

Q. Until the time——

A. May 11th.

Q. 1940?

A. Yes, sir.

Mr. Rogers: On the further ground that the question calls for a conclusion.

Mr. Marcus: I asked him whether he knew.

Mr. Rogers: That still calls for a conclusion.

The Court: Were there records kept of the receipts and disbursements from October? Who kept those?

The Witness: They were kept in the box office. I don't know.

[fol. 680] The Court: What?

The Witness: They were kept in the box office.

The Court: In the box office?

The Witness: Yes.

The Court: But not by you?

The Witness: No, sir.

The Court: Until after January?

The Witness: Yes, sir.

The Court: What was your work there?

The Witness: My job was projectionist, motion picture projectionist.

The Court: How would you know what the receipts were?

The Witness: I was also the Assistant Manager.

Mr. Marcus:

Q. Are these entries in your handwriting?

A. Yes, sir.

The Court: Do you mean the entire period, Mr. Marcus?

Mr. Rogers: That is what he is talking about now.

Mr. Marcus: That is right.

The Witness: No.

Mr. Rogers: One moment, please. You were asked do you know..

By Mr. Marcus:

Q. Do you know?

A. Yes.

[fol. 681] Q. Did that theatre make a profit?

Mr. Rogers: May it please the Court, I object to that on the ground the figures properly presented will permit the Court to come to a conclusion of whether or not a profit was made.

Mr. Marcus: You asked Mr. Murphy that question.

Mr. Rogers: Never mind about that. We have this witness here.

The Court: We are speaking about your personal knowledge. Did you handle receipts?

The Witness: Yes, sir.

The Court: What?

The Witness: Yes, sir.

The Court: You did?

The Witness: Yes, sir, I handled it.

The Court: Who paid the bills?

The Witness: I did.

The Court: What?

The Witness: I paid most of them.

The Court: Who paid some of them?

The Witness: It was between myself and Mr. Murphy's boy. He was the manager.

The Court: Who?

The Witness: Mr. Murphy's son.

The Court: Who took the money in?

[fol. 682] The Witness: The cashier.

The Court. The cashier. Did you deposit the money in the bank?

The Witness: Some days I made the deposits, and some days he made the deposits.

The Court: Did you put the money in the bank every day?

The Witness: I said he put the money in the bank some days, and some days I put it in.

The Court: How did you know how much they took in each night?

The Witness: I was part of the theatre. I was assistant Manager.

The Court: I don't think this man is sufficient qualified to testify as to that during that period.

Mr. Wright: If the Court please, he was permitted to go outside the scope of the direct, without any books or records whatever, and get expressions of opinion from Mr. Murphy as to what the profit or loss was, and what the operation was, whether or not it was profitable. Now,——

Mr. Rogers: Mr. Wright will not take a ruling of your Honor.

The Court: Sustained.

Mr. Rogers: I questioned the right of Mr. Murphy as the owner.

[fol. 683] By Mr. Marcus:

Q. In reference to Exhibit P-26, do you know whether or not a profit was made for that theatre?

Mr. Rogers: May it please the Court, I object to that, the records speak for themselves.

The Court: Sustained. The record is the best evidence.

Mr. Marcus: That is all.

Mr. Rogers: No cross-examination.

The Court: Next witness.

Price Coomer, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Marcus: At this point, your Honor, I should like to have it noted in the record, that although we have subpoenaed from the files their contracts in respect to Corbin, Kentucky, the only contracts thus far produced by the Schines in respect to Corbin, Kentucky, have been those of Fox and Paramount.

We should also like to have it noted that although subpoenas issued to Fox, Metro, Warner Brothers, Paramount

and R.K.O. call for the contracts of these companies for [fol. 684] theatres in Corbin, approximately 1935 until 1942, have, except for one or two contracts, not been produced. We understand, however, that an attempt is being made to produce them. When these contracts are produced, your Honor, the Government will introduce those deemed relevant. At this time we intend to introduce those contracts we have.

We should also like to put the defendants on notice that in the absence of the introduction of evidence of second-run contracts from the major distributors for theatres in Corbin, between 1936 and 1942, or rather, between 1936 and the date Schines took over the Kentucky and the Hippodrome in Corbin, Kentucky, we shall claim that not until then was there a policy of contracting for a season's second-run product for the Hippodrome or the Kentucky.

Mr. Rogers: Will you read that last please?

(Last paragraph was read.)

Mr. McKay: Your Honor, that is an obvious attempt to shift the burden of proof.

The Court: There is nothing to pass on.

Mr. Rogers: I was wondering why the statement was [fol. 685] made. There is nothing for your Honor to pass on. I don't see the purpose of the statement.

Mr. Marcus: Will you please mark this for identification, please.

(Thereupon, paper, referred to, was marked as Plaintiff's Exhibit P-27 for identification.)

[fol. 686] Mr. Rogers: No objection.

Mr. Marcus: I should like to offer into evidence Plaintiff's Exhibit 27 for identification, which purports to be a contract between Metro and the Schines for the season 1939-1940, second run product, for the Kentucky Theatre.

(Thereupon the contract previously marked as Plaintiff's Exhibit P-27 for identification was received in evidence.)

Mr. Marcus: I would like to have these documents marked for identification.

(Thereupon the exhibition contract referred to was marked Plaintiff's Exhibit P-28 for identification.)

(Thereupon another exhibition contract referred to was marked as Plaintiff's Exhibit P-29 for identification.)

(Thereupon another exhibition contract referred to was marked as Plaintiff's Exhibit P-30 for identification.)

(Thereupon another exhibition contract referred to was marked as Plaintiff's Exhibit P-31 for identification.)

[fol. 687] HUBERT B. WHITENACK, a witness recalled by and on behalf of the plaintiff, having been previously sworn, was examined and testified further as follows:

By the Court:

Q. Were there records kept of the expenses and receipts from the time you went there from October until January?

A. I think they were kept from the first of the year—from October to the first of the year.

Q. Did you have a bank account where your moneys were deposited and your checks paid out?

A. Yes, sir.

Q. Where was that?

A. At the Corbin Deposit Bank.

Q. The deposits were made each day, were they?

A. Yes, sir.

Q. And bills paid by check?

A. Yes, sir.

(Thereupon exhibition contracts referred to were marked as Plaintiff's Exhibits P-32 to P-43, inclusive, for identification.)

Mr. Rogers: I have no objection to P-28 for identification.

Mr. Marcus: I should like to offer in evidence Plaintiff's Exhibit P-28 marked for identification, an exhibition con-[fol. 688] tract between Schine and Paramount Pictures, for the Hippodrome Theatre in Corbin, Kentucky, for the season 1938-1939, first run.

(Thereupon the exhibition contract previously marked as Plaintiff's Exhibit P-28 for identification was received in evidence.)

Mr. Marcus: The date of this contract is 1-31-39.

Mr. Rogers: That service is for the season 1938-1939.

The Court: It would not be signed 1-31-39, would it?

Mr. Rogers: The application seems to have been December 1, 1938.

Mr. Marcus: There is a notation, "Accepted 1-31-39" and a stamp "February 17-39".

Mr. Rogers: In other words, the application was made December 1, 1938, but the approval was held up until February 17, 1939.

Mr. Marcus: Apparently, yes.

Mr. Rogers: There is no objection to P-29 for identification.

Mr. Marcus: I offer in evidence Plaintiff's Exhibit 29 for identification, a contract between Schine and 20th Century-Fox, dated June 6, 1939, for second run product in Corbin, Kentucky, for the season commencing August 1, 1939, and ending July 31, 1942.

[fol. 689] (Thereupon the exhibition contract previously marked as Plaintiff's Exhibit P-29 for identification was received in evidence.)

The Court: I assume that the various companies have all these contracts. Would we not save a lot of time if they were agreed to and stipulated? There is not any question about the authenticity of those contracts, is there? If not, it would save a lot of time by doing that.

Mr. Marcus: We could do it that way, your Honor. We thought we would try to get in as much as possible while we are dealing with Corbin, but if your Honor prefers, as long as these are marked, we could wait.

The Court: It is all one type of testimony and I assume these major companies have all these contracts and they could be put in at once, if there is no question about the authenticity of them.

Mr. Rogers: How would your Honor suggest, that we take them up in batches between us?

The Court: I do not know. I am just inquiring if we could not save a lot of time by putting those all in at one time.

Mr. Marcus: If it is your Honor's suggestion that we wait, we are quite willing to do it at that time.

[fol. 690] Mr. McKay: They took a deposition up in Gloversville prior to the last trial, at which time they

marked in the deposition some six or seven hundred contracts. We might be able to use those markings.

The Court: I do not think we should have much disagreement. I assume there is no question about the authenticity of these contracts?

Mr. Rogers: No. It is just a question of expedition and I am all for that.

The Court: It seems to me they could just as well be stipulated and agreed on and it would save all this testimony.

Mr. Wright: I think that is a good suggestion, your Honor. We hoped to have the material assembled on each situation at the time the witness was put on so that exhibit numbers could be put on at the same time, but I think it can just as well be done the other way.

PRICE COOMER, a witness recalled by and on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

[fol. 691] Direct examination.

By Mr. Marcus:

Q. Mr. Coomer, where do you reside?

A. I reside in Martinsville, Ohio, at the present time.

Q. What is your occupation?

A. I am in the theatre business and also operate a farm.

Q. How long have you been in the theatre business, Mr. Coomer?

A. Nine and a half years.

Q. Were you ever associated with any one in Lexington, Kentucky, in the operation of a theatre?

A. Yes, with Harry Swartz.

Q. Mr. Coomer, do you operate a theatre in Harlan, Kentucky?

A. Yes, I do.

Q. What is the name of that theatre?

A. The New Harlan Theatre.

Q. How long have you been operating that theatre?

A. Nine and a half years.

Q. Mr. Coomer, do you recall becoming interested in operating a theatre in Corbin, Kentucky?

A. I had a slight interest in acquiring a theatre in Corbin, which I heard was being built.

Q. What did you do in respect to that theatre, Mr. Coomer?

A. I found that it was Mr. Hiram Owens who was building the theatre. I called on Mr. Owens and inquired if he had found a tenant for his building. He said at that time [fol. 692] he had no lease——

Mr. Rogers: May it please the Court, I move to strike any conversations had between Mr. Coomer and Mr. Owens at which we were not present, as not binding on us.

The Court: What he has already stated is not very material one way or the other. The question is what the conversation was, I suppose.

Q. Did you discuss with Mr. Owens the possibility of leasing and operating the theatre which he was building?

Mr. Rogers: May we get the date of this talk?

Q. About when was that discussion?

A. In the early part of 1939.

Mr. Marcus: Read the prior question.

(Question read as follows: "Q. Did you discuss with Mr. Owens the possibility of leasing and operating the theatre which he was building?")

A. Yes, I discussed with Mr. Owens as to whether or not he had already acquired a tenant and he said no, that he was open for a proposition, and I told him I would like to make him a proposition, and I would have to see what the situation in buying films would be before I could make him a proposition.

Q. Did you attempt to get product for that theatre, Mr. Coomer?

Mr. Rogers: One moment.

[fol. 693] Q. Just answer that question. Did you attempt to?

Mr. Rogers: Pardon me, Mr. Marcus, you cannot tell me what objections I am going to raise or when. I object to that question on the ground it is immaterial. The man had no theatre, had nothing to buy any product for, and it is immaterial.

The Court: The form of the question is objectionable.

Mr. Marcus: Your Honor, it is certainly relevant——

The Court: I say the question in form is objectionable. Let him state what the conversation was if he attempted to get pictures.

Q. Did you go to Cincinnati trying to get product for this theatre and, if so, will you tell the Court approximately when?

Mr. Rogers: Now, I object to the form of the question on the ground that it calls for the operation of this witness's mind.

Mr. Marcus: I asked him where he went.

Mr. Rogers: Ask him did he go to Cincinnati and when.

The Court: Let him tell what talk he had about getting films.

Q. Did you have any discussions with the branch managers of any of the film exchanges in Cincinnati in respect to product for this theatre?

A. Yes, I did.

[fol. 694] Q. Will you name those film exchanges and the branch managers, if you are able?

Mr. Rogers: Can we get the dates and the people and the companies?

The Court: He is coming to the companies, I suppose.

Mr. Rogers: We have not got the date.

The Court: About when was this?

The Witness: It was in the early fall of 1939 that I talked to Mr. Owens and I went to Cincinnati the next day.

The Court: Who did you see there?

The Witness: In Cincinnati I saw the branch manager of Columbia.

Q. Who was it you saw there?

A. Mr. Allen Martz. I also——

Mr. Rogers: One moment. All you were asked was who you saw.

The Court: Where did you see him?

The Witness: In his office.

The Court: What company?

The Witness: At the Columbia Picture Corporation.

By Mr. Marcus:

Q. Will you tell the Court the substance of your conversation with Mr. Martz?

Mr. Rogers: May it please the Court, I object to it on the ground that there has no foundation been laid for the [fol. 695] testimony. There is no foundation laid as to who Mr. Martz is, what his duties are, what his connections are, or what his power is.

The Court: Perhaps you had better inquire in regard to his position.

Q. Did you know Mr. Martz prior to the time you went to see him in respect to getting product for the Corbin Theatre?

A. Yes, I——

Mr. Rogers: One moment. I object to the form of Mr. Marcus's questions. He continues saying what he went there for. I object to it.

The Court: Sustained in that form. Did you know this man Martz before this time?

The Witness: Yes, sir.

Q. Had you bought film for the Margie Grand from Mr. Martz prior to this time?

A. I didn't operate the Margie Grand.

Q. I mean the New Harlan Theatre.

A. In the New Harlan Theatre I had be-n using product from Mr. Martz of Columbia.

Q. And you knew Mr. Martz to be the branch manager of Columbia?

Mr. Rogers: One moment, please. May we get the witness's testimony so that the Court can conclude who Mr. [fol. 696] Martz is, not this witness?

Q. When you went to the Cincinnati office of Columbia, Mr. Coomer, did you ask for the branch manager?

A. I asked to see Mr. Allen Martz, who I knew was the branch manager from previous dealings with him in the Harlan Theatre.

Q. Could you give the substance of your conversation with Mr. Martz in regard to product for the theatre in Corbin?

Mr. Rogers: I object to that on the ground that it is not binding on these defendants and it is immaterial.

The Court: Overruled. State the substance of what you said.

A. I told Mr. Martz that the theatre in Corbin, which he knew was being built, I would like to know what product was available for Corbin first run. Mr. Martz informed me that they had a first run in Corbin. I said, "What about the change to second run?" He says, well, he didn't know, he couldn't give me an answer on it because the Schines were in the town now and he would have to take it up with New York. Mr. Martz went further in advising me that he though it would be a bad business proposition in Corbin; that there were already two theatres there.

Mr. Rogers: Just a moment. I move to strike that as opinion evidence on the part of Mr. Martz and not competent.

[fol. 697] The Court: Strike it out. Was anything else said about your getting pictures?

The Witness: Not with Mr. Martz. I called on other exchanges the same day.

By Mr. Marcus:

Q. Mr. Coomer, did you get a contract for product for that theatre in Corbin from Columbia?

A. No, sir, I did not.

Mr. Rogers: One moment. May it please the Court, I object to that as immaterial. There is no proof that this man ever had the theatre. How could he get it?

The Court: He said you could get first run? Did you say that?

The Witness: No, sir, he said the first run was already sold.

Q. Mr. Coomer, you said you called on other exchanges?

A. I called on the United Artists Exchange.

Q. Whom did you see there?

A. The branch manager.

Mr. Rogers: May we have the name of the gentleman?

Q. What was his name?

A. Mr. Max Stahl.

Q. Had you dealt with him prior to this time in regard to getting product from United Artists?

A. Yes, I had.

Q. Will you state the substance of your conversation [fol. 698] with him in regard to getting product for Corbin?

Mr. Rogers: The same objection.

The Court: Same ruling.

A. The conversation was pretty much the same——

The Court: No, what he said.

A. I asked him about the possibility of film for Corbin, first or second run, and he advised me that they had no product to sell in Corbin at all.

Q. Did you call on another film exchange in Cincinnati at that time?

A. I called on the Warner Bros. film exchange.

Q. Whom did you see there?

A. I saw the branch manager there.

Mr. Rogers: I move to strike it.

The Court: Yes. Who did you see?

A. I call Mr. Al Smittkin.

Q. Had you bought product from Mr. Smittkin prior to this occasion?

A. Yes, I had.

Q. How long had you known Mr. Smittkin?

A. Possibly a year or a year and a half.

Q. Will you state the substance of your conversation with Mr. Smittkin in regard to getting product for the theatre in Corbin?

Mr. Rogers: The same objection.

[fol. 699] The Court: Had you bought Warner Bros. pictures of him prior to the time you went there?

The Witness: Yes, sir,

The Court: How did you buy them of him? Did he come to your place, your theatre, or did you go there?

The Witness: At times the salesman calls on you and at times you go into Cincinnati and buy them.

The Court: Had you seen him in Cincinnati before?

The Witness: Yes, sir.

The Court: At the same place?

The Witness: Yes, sir.

The Court: Now, what did he say?

The Witness: Mr. Smittkin said they had no product for sale in Corbin, that both of their runs had been sold.

By Mr. Marcus:

Q. Did you make any other attempts to get product at that time from any of the other film exchanges in Cincinnati?

A. I don't recall making any other attempts. I decided it was a pretty tough proposition.

Mr. Rogers: One moment. I move to strike that.

The Court: Strike that out. Just answer the question. Did you make any other calls?

The Witness: No, sir.

Q. You never did enter into an agreement with Mr. Owens [fol. 700] in regard to that theatre in Corbin, did you, Mr. Coomer?

A. No, sir.

Q. Now, you state that you have been operating the New Harlan Theatre in Harlan, Kentucky?

A. That is correct.

Q. Prior to the 1941-1943 season had you been using Warner Bros. product at that theatre?

A. Yes, I had.

Q. Will you state to the Court what occurred in respect to 1941-1942 Warner product for the New Harlan?

A. I mean 1941-1942 season the film companies were selling product in blocks of five pictures as they were released. I bought the first block of the first five as a special feature that they were distributing that year, and also shorts for the entire year of 1940-1941.

The Court: That was 1941-1942?

The Witness: 1941-1942.

Mr. Rogers: That is Warner, I assume? You are speaking of Warner?

The Court: Yes.

By Mr. Marcus:

Q. Did you obtain a second block of five Warner pictures for that season?

A. I did not.

Q. Will you tell the Court what occurred in respect to [fol. 701] that second block?

A. While I was running some of the first block of five I noticed my opposition at the Margie Grand was advertising a picture released by Warners. As I recall, it was the Maltese Falcon. I knew that was on their second block of five, so that I contacted their salesman, Mr. Ralph Seigers, in Lexington. Mr. Seigers informed me that Schines had bought for the Margie Grand a second group of five.

[fol. 702] Q. Was that second group ever offered to you by Warner's?

A. No, sir.

Q. Did you run any Warner's product for the 1941-'42 season at the New Harlan Theatre in Harlan, Kentucky?

A. Yes, I run six pictures.

Q. Did you ask Warner's for more than those six pictures for that season?

A. Yes.

Q. And what occurred in respect to the rest of those pictures?

A. I was refused the other pictures.

Mr. Rogers: I move to strike that out.

The Court: Strike it out.

Q. Did you get those other pictures you asked for?

A. No, sir.

Mr. Rogers: I move to strike. There is no evidence he ever asked.

Mr. Marcus: I beg to differ.

The Court: Let us hear what he said. He said he got six pictures. Did you get any more?

A. I didn't obtain any more pictures that year.

The Court:

Q. Was there talk *was* other pictures?

A. After I had this conversation with Mr. Sanders I decided to go in to see——

The Court: No, you went in to see——

[fol. 703] The Witness: I went in to see the manager.

Mr. Rogers: What is his name?

The Witness: I believe at that time it was Mr.—I don't recall the manager, the managers had changed during that time.

Mr. Rogers: I then move to strike the testimony he went in to see the manager.

The Court: Let us hear what he says.

Mr. Rogers: May we get the date of that talk?

By Mr. Marcus:

Q. When did you go there?

A. January, 1941

Q. Had you dealt with this individual you met at that time before in regard to obtaining the product?

A. Yes, I dealt with him part of the previous year.

The Court: Would that be January, 1941, or January, 1942?

The Witness: '41.

Mr. Marcus: January, 1941, for the 1941-'42 product.

Mr. Rogers: I-- couldn't be. His Honor is right. It would have to be January, 1942.

Mr. Marcus: That is right.

Mr. Rogers: Which is it? May we have the witness' testimony.

Q. Could you state?

[fol. 704] A. I have those records. If I may be permitted to refer to the exact dates.

The Court: You may have the records if you cannot recall.

Mr. Marcus:

Q. To the best of your recollection about when?

A. In the first part of January.

Q. Was it 1941 or '42? This was in respect to the 1941-'42 product?

A. Well, the 1941-'42 product would naturally be sold in 1941. I still think it was January, 1941.

The Court: You said you got six already. You were operating on those.

Mr. Rogers: Your Honor, he also said he had the first block of five for 1941-'42. Then he got six more.

The Court: No.

By Mr. Marcus:

Q. Would that be 1942, do you think?

A. It possibly could be 1942, because the selling arrangement was changed that year.

Q. So now to the best of your recollection, you would fix the time as some time in January, 1942?

A. I believe that is correct.

Q. Would you state the substance of what was said at that time?

[fol. 705] Mr. Rogers: I object to that on the same grounds, not binding, and on the grounds it is immaterial, and on the grounds there is no evidence of authority on the part of the person he spoke to, nor is the person identified.

The Court: Unless it clearly appears *from* the man's relations with the Company were.

By Mr. Marcus:

Q. Mr. Coomer, when you went to this office, did you notice whether on the door leading to this office there was any name or title?

A. I went to Warner Brothers' office. I stopped at the information desk and asked if I could see——

Mr. Rogers: One moment please. I move to strike, not responsive. He merely asked if there was anything on the door.

The Court: I think you said you dealt with this man before.

The Witness: Yes, sir, that is correct.

The Court:

Q. How frequently, in what capacity, in what way?

A. In the capacity of dating pictures, being in the office. I had seen him several occasions, talked to him regarding dating pictures.

The Court: Your pictures?

[fol. 706] Mr. Rogers: Is that "dating pictures"?

The Witness: Yes.

Mr. Rogers: He said he only spoke to him about dating pictures.

The Court: You got pictures through this man before?

The Witness: Yes, sir, that is correct.

Mr. Marcus:

Q. Will you state what occurred on that occasion, Mr. Coomer?

A. Well, the Court brought up the subject I had been the accountant for the last couple of years on that product. I had obtained the first five years a special picture or special contract.

The Court: Your first sale?

The Witness: Yes, sir, and would I be able to obtain the third group of pictures.

Q. Mr. Coomer, you are now talking in reference to product for the New Harlan?

A. Yes, sir, the New Harlan Theatre. I attempted to get the third group of pictures after I had been told the second group had been sold to the Margie-Grand.

Mr. Rogers: One moment. I move to strike.

The Court. That is your conclusion. What talk did you have with this man about pictures, if any?

The Witness: I asked to buy the third group of pictures.

[fol. 707] Q. Did you get the third group of pictures?

Mr. Rogers: One moment. Let us see what was said.

Q. All right. What was said?

A. They informed me that the third group of pictures were already sold to the Margie-Grand.

Q. Was anything further said?

A. I immediately wanted to know the reason for selling away from me. I would be able to buy some of the pictures in the future. I thought inasmuch——

The Court: Not what you thought.

The Witness: Inasmuch as the ruling stated both theatres were supposed to have the offer of the pictures I had had them offered to me other than the first group. I certainly was entitled to half of the product.

Mr. McKay: Your Honor, we are getting dangerously close to the date of May 19, 1942, and your Honor will recall Mr. Wright stated no evidence would be offered relating to occurrences beyond that date, so from this point on I think the date should be fixed with considerable more certainty than has been done up to now. We have been dealing with prior time, but now he is talking about 1941-1942 product

which runs into August, 1942, and I just want to caution [fol. 708] Mr. Marcus and the witness not to go beyond May 19th.

Mr. Marcus: We are duly cautioned, Mr. McKay.

The Court: What further was said about the pictures?

The Witness: I was informed as to buying future pictures that they might release, and they said they could only talk about pictures which were now made, and they were already sold to the Schine Circuit.

Q. Did you make any further attempts?

The Court: When did you say this conversation was?

The Witness: All of this conversation was in the early part of 1942.

Mr. Rogers: May we have those fixed, your Honor?

Q. Would you say it was in January?

A. I would say that this probably had taken place possibly February, first part of February, the conversation in the office.

Q. Did you make any further attempts to get product from Warner Brothers for that season?

A. Not after I had been definitely refused, no.

Mr. Rogers: I move to strike.

The Court: Strike it out. What they told him may stand, but the conclusion is stricken out, "definitely refused" is stricken out.

[fol. 709] Q. Mr. Coomer, prior to the time when Schines began to book pictures for the Margie-Grand Theatre in Harlan, Kentucky, had the Margie-Grand Theatre played-second-run products which you had already played first-run in the New Harlan?

A. Not to my knowledge, no.

Q. After the time that Schines began to book pictures for the Margie-Grand, what occurred in that respect? Was there any change?

A. After Schine came into Harlan I saw the pictures which I had run in the New Harlan first-run being exhibited in the Margie-Grand second-run.

Q. Mr. Coomer, was there any change in the policy of the Margie-Grand in regard to "give-aways" after the time Schine began to book pictures for the Margie-Grand as contrasted to the prior period?

Mr. Rogers: One moment. I object to that on the ground no foundation has been laid, no evidence there was any policy in reference to give-aways prior to the time Schines took over. This is on give-aways, may it please the Court, and the witness is interrogated whether there is a change of policy when there has been no evidence at all.

The Court: I will let him tell what he did.

[fol. 710] Mr. Rogers: Do you withdraw the question, Mr. Marcus?

Mr. Marcus: Yes.

The Court: If there is an answer to that strike it out.

By Mr. Marcus:

Q. Will you state what occurred in respect to "give-aways" at the Margie-Grand Theatre after the time Schine began to book pictures for the Margie-Grand?

Mr. Rogers: May it please the Court, I object to that as immaterial.

Mr. Marcus: I think it is quite material. That is one of the things contained in our complaint.

Mr. Rogers: May it please the Court, there is no evidence, and I don't think there ever will be any evidence here that there was an unusual practice on the part of any theatre to have give-aways. They all have given-aways, and that being the case, I don't think Mr. Marcus will ever contend that this was unusual for just this one theatre, the Margie-Grand. I think he will have to concede that was general all over the country.

Mr. Marcus: There was one type of give-away and another type of give-away, and I think we are entitled to bring that out.

Mr. Rogers: Then, may it please the Court, I press my [fol. 711] objection on the further ground that that relates to a purely local matter, after all give-aways can be anything but a matter of local policy. It can't certainly be embraced within the Anti-trust Law violation.

The Court: Overruled. What did they do with reference to give-aways?

The Witness: After Schines acquired an interest in the Margie-Grand for operation there were automobiles given away, and then there was also a form of giving away money called "Sweep-stakes".

Mr. Rogers: May we get the date of this?

Mr. Marcus: He said at the time.

Mr. Rogers: At the time is a long time. It may mean even today. May we get the date, please?

The Witness: Around nine months after Schine became interested in Harlan.

Q. Do you recall about how regularly automobiles were given away?

Mr. Rogers: May we get the period?

Mr. Marcus: Starting with a period approximately nine months from the time Schine became booking agent for the Margie-Grand?

The Witness: They were giving away the automobiles at [fol. 712] the rate of one a month.

Mr. Rogers: Pardon me. Mr. Marcus, I must ask you to please direct your question—he was testifying after Schine took the theatre over, and you are talking now about the time Schine started to book the theatre. You have me confused.

The Court: He said about nine months after when?

Mr. Rogers: Nine months after when?

The Witness: Nine months after Schine became interested in the Margie-Grand.

Mr. Rogers: What year is that?

The Witness: It was in 1939, '38 and '39, both.

By Mr. Marcus:

Q. Mr. Coomer, had automobiles been given away by Schines' Margie-Grand prior to the time Schines became booker for the Margie-Grand?

Mr. Rogers: I object to that as immaterial.

The Court: What was the question?

Mr. Marcus: I asked Mr. Coomer whether he knew automobiles had been given away by the Margie-Grand prior to the time Schines became booking agents for the Margie-Grand.

The Court: I don't think that would be competent what somebody else may have done.

[fol. 713] Mr. Marcus: I merely wanted to show your Honor the contrast.

The Court: Sustained.

By Mr. Marcus:

Q. Mr. Coomer, in 1938, were you the owner or the lessee of the new Harlan Theatre?

A. Yes, I was.

Q. Which?

A. I was lessee and operator of the business.

Q. Do you recall any representatives of the Schines contacting you in respect to buying your theatre in Harlan, Kentucky, and if so, would you state about when?

A. I was contacted by Mr. Lazer December, 1938.

Q. Will you state the substance of your conversation with Mr. Lazer on that occasion?

A. Mr. Lazer told me that they had bought the Margie-Grand Theatre and delivered the theatre in Pikeville, lock, stock and barrel, and they would like to make a deal with me and asked me to make them a proposition.

Q. Did Mr. Lazer say anything else at that time in that conversation?

A. We had quite a lengthy conversation in regard to my former associate, Harry Schwartz, and what he was doing in the theatre business.

Q. What did he say about Mr. Schwartz?

[fol. 714] Mr. Rogers: One moment. I object to that as immaterial.

The Court: I don't see how it is material.

Mr. Marcus: Your Honor, this matter of what Mr. Lazer said in respect to Mr. Schwartz has considerable relevancy. We have alleged as part of our——

Mr. Rogers: Pardon me.

Mr. Marcus: I want to make an explanation.

Mr. Rogers: I don't want you to make an explanation of what you intend to prove or what you hope to prove by this witness.

Mr. Marcus: I don't intend to go that far.

Mr. Rogers: I hope you don't intend to go that far.

Mr. Marcus: One of the situations we shall develop, your Honor, is in Paris, Kentucky.

Mr. Rogers: Paris, Kentucky is not on the list?

The Court: You refer to some statement made by Mr. Lazer about Mr. Schwartz?

Mr. Marcus: In Paris, Kentucky.

The Court: With Schwartz, you mean?

Mr. Marcus: That is right.

The Court: Overruled. What did he say?

The Witness: I mentioned the fact that Mr. Schwartz had obtained a lease on property in Paris on which he in-

[fol. 715] tended building a theatre which would be in opposition to Schines in view of the fact they had just acquired the theatres in Paris, they were already built, and I also mentioned the hardship imposed on Schwartz in the Opera House in Lexington on product, just a general conversation, what had happened to Schwartz in regard to obtaining product in Lexington.

Mr. Rogers: I move to strike that part.

Mr. Marcus:

Q. What did Mr. Lazer say?

Mr. Rogers: Pardon me. I move to strike that part in which this witness said he spoke about hardship which had been imposed upon Schwartz in Paris.

The Court: Strike it out.

Q. What did Mr. Lazer say?

A. Lazer told me that if Schwartz went ahead with his building in Paris, Schines would build a 1200-seat theatre on the corner of Main and Broadway, and that they would buy up all the product and run their house.

Q. When you say Broadway, in what city are you referring to?

A. Lexington. They would run a house with ten cents policy at all times.

Mr. Rogers: May it please the Court, I move to strike [fol. 716] that as having no relevancy whatever on this witness' situation.

The Court: Strike it out. I don't think any authority is shown for making a statement of that kind.

Mr. Marcus: Your Honor may recall we read answers to the interrogatories concerning Mr. Lazer yesterday. From those answers it appears Mr. Lazer at that time was division manager covering Kentucky, Ohio and Virginia. He was the Vice President of the Schines Lexington Corporation. I certainly think that should be sufficient to show authority.

Mr. Rogers: May it please the Court, I directed my objection to the competency of this testimony.

Mr. Marcus: The authority.

Mr. Rogers: The competency, I said, and having no bearing on the situation of Mr. Coomer in Corbin, or anything pertaining to Mr. Coomer. There is no intimation here

that they used any inducement or any threat to Mr. Coomer.

The Court: Objection overruled.

Q. Mr. Coomer, you state that you had a lease on your theatre in 1938?

[fol. 717] The Court: Which one, the New Harlan?

Mr. Marcus: The Margie-Grand.

Mr. Rogers: He didn't have the Margie-Grand.

Mr. Marcus: The New Harlan.

The Witness: Yes, I had a lease in 1938.

Q. Have you made any other leases with your landlord in respect to that theatre since that time?

Mr. Rogers: That is objected to as immaterial.

Mr. Marcus: We are going to develop something, your Honor. I should appreciate being allowed to continue.

Mr. Rogers: I press my objection.

The Court: When was your original lease?

The Witness: November, 1932, I believe, sir.

The Court: The question now is did he renew the lease, is the question for the New Harlan.

Mr. Marcus: That is right. I want to develop——

By Mr. Marcus:

Q. Did you have another lease subsequent to the one you had in 1938?

A. Yes, there was another lease made.

Mr. Rogers: That I object to as immaterial.

Mr. Marcus: We will show it was material.

The Court: Overruled.

Q. Do you recall the approximate date when you entered [fol. 718] into this second lease?

A. Possibly in 1933, I entered into a new lease which was my second lease.

The Court: He asked you after 1938.

Mr. Marcus:

Q. After 1938?

A. After '38 I have had a new lease.

Q. And when was that?

A. That was it became effective March 1st, 1944, the last lease.

Q. What was the occasion for you making this second lease, Mr. Coomer?

Mr. Rogers: May it please the Court, I object to that.

The Court: It became effective in 1944.

The Witness: I am speaking of the third lease and Mr. Marcus is speaking of the second lease.

The Court: What was the first lease you made after 1938?

Mr. Marcus: Did you make another lease in 1938?

The Witness: Probably in 1938, there was a second lease made.

Q. What was the occasion for you making that second lease?

Mr. Rogers: May it please the Court, I object to that as immaterial.

The Court: I don't know. I will let him answer.

[fol. 719] The Witness: The reason is for making the second lease was my first lease only provided for five years. The second lease was made at the expiration of three years —at three years, not the expiration—I felt that having opposition with Schine, no renewal clause in my lease, that I should have another lease.

Mr. Rogers: I move to strike that out.

The Court: Strike it out.

Mr. Rogers: That he felt he had the opposition of Schine.

The Court: Yes, that may be stricken out. You made a new lease?

The Witness: Yes, sir.

By Mr. Marcus:

Q. Who was your landlord?

A. The Harlan Theatre Company.

Q. With whom in that company had you deal- with in respect to the rental of the New Harlan?

A. Mr. A. C. Jones, he was Secretary and Treasurer of the corporation.

Mr. Marcus: Will you mark these for identification, please?

[fol. 720] (Thereupon the photostat of a letter dated December 20th, 1940, was marked as Plaintiff's Exhibit P-44 for identification.)

(Thereupon the photostat of a letter dated December 13th, 1940, was marked as Plaintiff's Exhibit P-45 for identification.)

The Court: We will suspend for five minutes.

(Short recess.)

[fol. 721] Cross-examination.

By Mr. Rogers:

Q. When, for the first time, did you buy product for the New Harlan Theatre?

A. 1934.

Q. Is that the time when you originally took over the New Harlan?

A. That is correct.

Q. And at that time what was the other theatre in the town?

A. The Margie Grand Theatre.

Q. And they were the only two theatres in the town, weren't they?

A. That is correct; only two theatres.

Q. And who was operating the Margie Grand in 1934 when you took over the Harlan?

A. Mr. G. O. Scott.

Q. In 1934 what kind of a house was the New Harlan; was it a first run or a second run house?

A. In 1934 the New Harlan was closed.

Q. When you took it over, I mean. When you opened it what was the product you bought for the 1934-1935 season, first run or second run product?

A. Both first run and second run.

Q. Can you tell us which first run product you bought [fol. 722] for that season, 1934-1935?

A. I bought United Artists.

Q. That is first run?

A. That is first run. And I bought Columbia; Columbia for that present year, the United Artists for the year past, which had not been run in Harlan, which made it first run there. It was not for the 1934 season. It would have been for the 1933-1934 season.

Q. United Artists was 1933-1934 and for Columbia 1934-1935 first run; is that right?

A. That is correct.

Q. With reference to 1934-1935 did you buy United Artists for that season?

A. I did.

Q. What run?

A. First run.

Q. In 1934, besides buying United Artists first run for the preceding season and United Artists for 1934-1935 first run and Columbia first run, what other product did you buy for the house?

A. I bought all the second run that I was able to buy.

Q. Do you remember which companies?

A. I don't remember which companies second run.

Q. You don't recall?

A. No.

[fol. 723] Q. In 1934 do you recall what product the Margie Grand was running first run?

A. In 1934 the Margie Grand was runing Metro, Paramount, Fox, Universal and Warner Bros. I think that is all.

Q. How about R. K. O.?

A. They were also running R. K. O.

Q. Now, after the season of 1934-1935 did the situation of first run product in the Margie Grand change in any way?

Mr. Marcus: Your Honor, on direct examination we asked Mr. Coomer only as to Warner first run. If Mr. Rogers wants to ask Mr. Coomer as to the first runs of other companies he should make Mr. Coomer his witness.

The Court: I will pass on that when the question comes up.

(Last question read.)

A. Yes, it did change.

Q. And when did the change occur?

A. I don't recall the dates without referring to the records.

Q. Well, approximately when?

A. Approximately a year or a year and a half after my operations.

The Court: A year and a half after 1935 or a year and a half after——

The Witness: Possibly a year or a year and a half after I became operating the theatre.

[fol. 724] Q. Well, that would be, then, some time in 1935 or the early part of 1936; is that right?

A. I won't try to fix the date.

Q. When did you start your operations in the New Harlan?

A. I referred to the records during the recess. The exact date was November 24, 1934.

Q. Then it would be about a year or a year and a half after November 24, 1934, that this change occurred; is that right?

A. To the best of my knowledge that would be about the date.

Q. Well, had you had a lease on the New Harlan Theatre before you opened it and operated it?

A. I had a lease which was dating from January 1st, but I was allowed the privilege of opening the theatre with a couple of months free rent.

Q. In other words, you say you had a lease starting January 1, 1934, and you didn't open until November 24, 1934?

A. I am a little confused on the dates. The lease would be dating from January 1, 1935, really. That would be the effect of the lease. The lease was made, of course, in 1934.

Q. In other words, you had a lease that became effective January 1, 1935, but the owner allowed you to go in about a month and a half in advance and take possession of the theatre without paying rent; is that it?

[fol. 725] A. That is correct.

Q. Do you remember testifying to Mr. Marcus that your first lease was made in 1932?

A. Yes, I do.

Q. That was not accurate, was it?

A. No, sir, I was confused on dates, not having my records with me.

Q. The accurate date is the date you have just given now? The lease was made on January 1, 1935, went into effect on January 1, 1935, and you opened on November 24, 1934? Those are the accurate dates?

A. I wouldn't confirm those as being the accurate dates. I don't have the records with me.

Q. Is it accurate under the terms of your lease that your term started on January 1, 1935? Is that accurate?

A. I wouldn't even say that is accurate. I would say the first of the year was accurate. I don't know whether it was 1934 or 1935 now.

Q. Is it accurate that you opened this theatre on November 24, 1934? Is that accurate?

A. That could be a year sooner or a year later. I am not confirming those dates.

The Court: You said you had the records here. Have you the records?

The Witness: No, sir, I don't have the record of the lease. [fol. 726] I was not subpoenaed for that.

The Court: I thought you said you had them.

Mr. Rogers: I thought so too.

The Witness: Not the records.

Q. You say there was a change with reference to the product in the Margie Grand Theatre, that is first run product, that occurred about a year or a year and a half after you started your operations at the New Harlan. Now, what was that change?

A. I was offered first run product of Universal, which I bought.

Q. Well, at the time that Universal offered you this first run product it had prior to that been playing that first run product at the Margie Grand, hadn't it?

A. That is correct.

Q. So that you bought Universal away from the Margie Grand, didn't you?

Mr. Marcus: I would like to renew my objection, your Honor, We did not go into the question of any other company except Warner Bros., and this is improper cross examination.

The Court: Overruled. You said "bought away." What do you mean?

Mr. Rogers: The expression was used here about "bought away" on the part of the plaintiff. What applies [fol. 727] in the plaintiff's examination applies equally in the defendant's examination. May we have the question, please?

(Question read.)

A. I bought Universal from the Universal Film Corporation.

Q. During the period when the Margie Grand was the Universal's customer first run; is that right?

A. The Margie Grand had been the Universal's customer the year past.

Q. Now, was there any other change made with reference to first run product concerning the Margie Grand, other than you buying the Universal first run?

A. You asked me did I buy any other product?

Q. First run, yes.

A. Yes, some time after that, without fixing the dates. Possibly another year or maybe two years. I was offered the Warner Bros.-First National contract first run.

Q. You say you were offered it. Did you buy it?

A. I did.

Q. And you got Warner first run, is that right?

A. That is true.

Q. So that at that time you had United Artists first run, Columbia first run, Warner Bros. first run, and Universal first run; is that right?

A. That is correct.

[fol. 728] Q. When was it you had all those four first runs?

A. I had been operating the theatre possibly four to five years before I had secured all of those first runs.

Q. You mean it was not until about 1938 that you had all those four products?

A. In 1938 I did have those four products.

Q. Hadn't you had them prior to 1938?

A. There is a possibility I had, but I do know positive I had them in in 1938.

Q. When you opened the New Harlan in 1934 who was playing Republic first run?

A. The Republic was not in existence at that time, as a company.

Q. When did Republic come into existence?

Mr. Marcus: Your Honor, we object to any questions being asked in respect to Republic product. We have limited our complaint to the major distributors and the Republic is not one of the major distributors. Mr. Rogers has started to interrogate Mr. Coomer in regard to Republic product.

The Court: There has been some testimony relative to the independent distributors.

Mr. Marcus: We have not on direct and not in the complaint attempted in any way to develop any matter in re-

[fol. 728a] spect to film products save in the case of the major distributors.

The Court: I think it is competent to show what he had. Objection overruled.

Q. When did you for the first time get the product of Republic?

A. I won't fix the date, but I saw by an announcement that Republic was being formed as a corporation and I immediately applied myself for a contract with the Republic, which I made for the first year the product was in operation.

Q. And you have had it ever since, first run, haven't you?

A. That is correct.

Q. When did you get Monogram first run?

A. Monogram also has been existing—I think probably they were existing some years ago, but they haven't been existing so long. I have had Monogram, I think, approximately for the past five years, four or five years.

Q. And ever since the time you became a Monogram customer first run that product has been yours right along first run, hasn't it?

A. Yes, sir.

Q. And that took place after Schines got into the Margie Grand, didn't it?

A. I won't say. I don't remember.

[fol. 729] Q. Do you remember when Schine took over the Margie Grand?

A. There is no way of me knowing when Schine took over the Margie Grand. I think there was an announcement made, but I don't recall the date.

Q. You remember when the Schine outfit started to operate the theatre, don't you?

A. I wouldn't know that.

Q. Now, didn't you testify under direct examination that the Margie Grand had not run second run after Schine bought the Margie Grand?

A. No, sir, I did not.

Mr. Marcus: I don't think that was his testimony. There is no such testimony, your Honor.

Mr. Rogers: One moment, now. I beg your pardon. Here is what I think you testified to. You said the Margie Grand had not run second run, but after Schine bought the Margie Grand then the Margie Grand started running second run. Didn't you so testify?

Mr. Marcus: That is not Mr. Coomer's testimony either.

Mr. Rogers: He nodded his head and said yes. Didn't you so testify?

The Witness: That is right.

Mr. Marcus: That is in respect——

Mr. Rogers: Please don't argue. Mr. Coomer says that is right.

[fol. 730] The Court: What was the question?

Mr. Rogers: I asked him didn't he testify that originally the Margie Grand had not run second run, but after Schine bought the Margie Grand the Margie Grand did run second run.

Mr. Marcus: The best way to determine that is to refer to the reporter's minutes.

The Court: I will let it stand, but I don't recall the testimony.

Mr. Marcus: Your Honor, the witness probably is confused. He testified on direct that the Margie Grand started to play second run film of the first run film that he had played in the New Harlan, which is different.

Mr. Rogers: No, he said about Schine, not the Margie Grand. It was with reference to Schine. The witness says that is accurate. Let us stop arguing.

By Mr. Rogers:

Q. That is accurate, isn't it, Mr. Coomer?

The Court: What did you testify to about Seigers, what he said? Was Seigers the man you saw at Warners? Seigers was his name?

The Witness: Mr. Smittkin I saw at one time at Warners.

The Court: Was it Mr. Seigers?

The Witness: No, Mr. Al Smittkin at Warners.

[fol. 731] By Mr. Rogers:

Q. Seigers is the salesman?

A. Ralph Sailors.

The Court: You testified that Sailors said that Schine had bought the second run?

The Witness: Yes. No, that Schine had bought the first run.

The Court: I understood you testified that Schine bought the second run. All right, go ahead.

By Mr. Rogers:

Q. In any event, you recall having said——

The Court: I am in error about that. He was talking about the second group.

Q. You recall having said that after Schine came into the New Harlan and started operating that Schine started buying second run product at the Margie Grand? That is right, isn't it?

A. I didn't testify to a question like that, no, sir. It was put different.

Q. What did you testify to on that second run?

A. I testified to the fact that the Margie Grand had never run second run after the New Harlan before Schine came.

Q. Exactly what I am saying.

A. No, you are not saying that.

Q. After Schine came you say they did run second run?

A. There is a difference between second run behind the [fol. 732] Harlan Theatre and second run behind the Margie Grand, or Mr. Schine's own pictures.

Q. You testified they did run second run behind the New Harlan Theatre after Schine came in; is that right?

A. That is correct.

Q. How did you fix that date? You say you don't know when Schine came into the town?

A. I didn't attempt to fix that date. I didn't fix the date. I wouldn't know who was operating the theatre, what my opposition was doing.

Q. That is the question I asked you. I said you did know and you said you didn't know. If you know, tell us.

A. I don't know the exact date when Schine came into Harlan.

Q. Do you know the exact date when he came in to run the Margie Grand?

A. I know that Schine was running the Margie Grand in 1938-1939 and he has been there since.

Q. And he has been running it since, you say?

A. As far as I know, sir.

Q. Now, then, by the time you got to about 1938 and you had at the New Harlan first run Columbia, United Artists, Universal?

A. That is right.

Q. Warner?

A. Right.

[fol. 733] Q. Republic?

A. Right.

Q. Monogram?

A. Right.

Q. And did you have any other product first run?

A. Not to speak of. Perhaps maybe a picture or two from an independent company.

Q. And originally the Margie Grand, the opposition, had Universal and Warner, and you succeeded in getting Universal and Warner after you got into the town; is that right?

A. I got Universal and Warner after I operated the New Harlan.

Q. Then after you had bought Warner away from the Margie Grand then you say that in 1940-1941 that you got the first block of Warner, and then Warner sold its product to Margie Grand; is that right?

A. Block selling was not introduced——

Q. I am just asking you a very simple question.

A. You have got your dates wrong, then.

Q. 1941-1942; is that right?

A. That is right.

Q. That is what I said, 1941-1942.

A. I beg your pardon.

Q. That is correct, isn't it?

A. 1941-1942 product is correct.

[fol. 734] Q. Then in 1941-1942 season you got the first block of five from Warner, didn't you?

A. That is correct.

Q. And then you say you ran six during that season; is that right?

A. I had a special picture which made six.

Q. You had one additional special picture, which made six?

A. Yes, sir.

The Court: That was at the other theatre, wasn't it?

Mr. Rogers: The same theatre.

Mr. Marcus: There is only one theatre. Mr. Coomer, may it please the Court, first testified in respect to Corbin as to a theatre he intended to operate, but he never did.

The Court: You testified that you got six at the New Harlan?

The Witness: Six pictures on the 1941-1942 contract, yes, sir.

The Court: You got them when?

The Witness: They were bought some time in 1941 or 1942. I just don't recall when it was sold. It was that year's product.

Q. Then you spoke about your buying a group of five preceding that?

A. No, sir, I only bought one five. The group was grouped in five. I bought the first group and the one special at the same time. That is all I bought on that year's [fol. 735] contract.

Q. That is what you call the six, then?

A. Yes, sir.

By Mr. Rogers:

Q. Is it your testimony that the Margie Grand never had Republic product?

A. No, sir, I didn't make any testimony to that effect.

Q. Then it is not your testimony that Republic was never played at the Margie Grand; is that right?

A. Republic is playing at the Margie Grand at present, I think.

Q. I mean prior to the time you got Republic didn't Republic play at the Margie Grand before it played at the New Harlan?

A. No, sir.

Q. That is your testimony?

A. That is absolutely my testimony.

Q. You say they play Republic now, that is, the Margie Grand plays Republic now? You mean they play second run?

A. That is right.

Q. After you play it at the New Harlan; isn't that right?

A. Yes, sir.

Q. During the time that you have been operating the New Harlan haven't you had give-aways there?

A. For about three weeks, possibly five weeks, three to five weeks I run what was run as Bank Night.

[fol. 736] Q. In addition to running Bank Night didn't you have give-aways there?

A. In the first—in the early years of my owning the New Harlan Theatre and operating it there were occasions when

we gave away, I believe, ice cream and possibly some form of pop at the starting of new serials, which would be just one time, once a week, which would stretch over a period of possibly fifteen weeks before it would be done again.

Q. Do you mean that was the only give-aways you ever gave away in that New Harlan Theatre from the time you operated it until May of 1942?

A. I wouldn't say that. It has not been my practice for give-aways.

Q. Haven't you given give-aways, other than ice cream and pop?

A. Since when, sir?

Q. I told you from the time you started to operate until May of 1942.

A. That has nothing to do with Schine that I can see.

Q. One moment, now. We will have the Court determine that.

The Court: Answer the question. When did you have give-aways?

The Witness: I don't recall any give-aways other than at very widely separated times. I can't recall any give-aways except on the starting of serials. Of course I had a manager [fol. 737] running the New Harlan Theatre. It is possible he had a give-away that I didn't know anything about.

Q. Do you mean you never gave away anything more valuable than an ice cream cone or a bottle of soda pop from the time you took it over until May of 1942?

A. I think possibly when I started operating the theatre that we gave away a couple of bicycles.

Q. You recall giving away a couple of bicycles. What else do you recall giving away?

A. I don't recall giving away anything else except the things that I mentioned.

Q. Other than some bicycles and some soda pop and ice cream you say you don't recall that theatre having given away any other give-aways from the time you opened it until May of 1942?

A. There is a possibility when I first opened it that I might have given away some two-for-ones, right when I first opened.

Q. Those two-for-ones are one admission ticket, you mean, where you allowed two people to come in on one price of admission?

A. Yes. I don't recall that. Possibly I did.

Q. On these Bank Nights that you had how much money [fol. 738] did you give away on a Bank Night?

A. A Bank Night started at $25. Of course, if no one claimed it it was added to the jack pot, and my jack pot went up to $200, which was given away.

Q. In other words, on one evening a $200 jack pot was given away to a lucky member of the audience who got a lucky number; is that right?

A. That is right.

Mr. Rogers: That is all, Mr. Coomer.

Mr. Marcus.

That is all.

The Court: We will recess now.

(Whereupon a recess was taken until 2 o'clock P.M.)

[fol. 739] After Recess, 2 o'clock, P. M.

Appearances: As before noted.

Mr. Rogers: I assume you are finished with the witness, Mr. Coomer?

Mr. Marcus: That is right.

Mr. Rogers: That being so, may it please the Court, I move to strike the testimony of Mr. Coomer on the ground that the testimony has not been properly connected, that we have not had evidence properly connecting the authority of any of the persons with whom the conversations were had, and also on the ground that the testimony related to purely local transactions.

The Court: Denied.

Leon Bernard Scott recalled, by and on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination.

By Mr. Marcus:

Q. Mr. Scott, do you have the folder with you in which you [fol. 740] brought your documents?

A. I do.

Q. Does that folder contain any agreements other than the ones that were shown you this morning?

A. This paper right here (indicating).

Q. No contract?

A. No contract whatsoever.

Mr. Marcus: That is all, Mr. Scott.

Cross-examination.

By Mr. Rogers:

Q. Mr. Scott, may I ask you, the four contracts introduced in evidence here, which were shown to you this morning, they are the only contracts you recall having been turned over to you with reference to that transaction?

A. I couldn't answer that. I really don't know.

Q. Are they the only four that you saw?

A. They are the only four that I could find.

Mr. Rogers: That is all, Mr. Scott.

[fol. 741] Grover C. Scott recalled by and on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Direct Examination.

By Mr. Marcus:

Q. Mr. Scott, was there a provision in any of the contracts you turned over to Mr. Leon Scott, providing against your competing with the Schines in Corbin, Kentucky, in respect to the operation of a theatre?

Mr. Rogers: I object to that, may it please the Court, on the ground that the contract provision would be the best evidence and on the further ground that the question calls for a conclusion on the part of the witness.

The Court: Was there another contract besides the four contracts?

The Witness: It has always been my conviction, opinion and belief——

By Mr. Marcus:

Q. To the best of your recollection, was there another contract besides those four?

Mr. Rogers: May it please the Court, I object to that on the ground the contract itself is the best evidence.

[fol. 742] The Court: Overruled.

The Witness. The best of my recollection there is a contract covering the deal in Corbin, Kentucky.

Mr. Rogers: I didn't get that.

The Witness: The deal whereby the Schine interests gave us, Leon Scott and myself, $2500 for the lease in Corbin. I haven't seen that contract.

By Mr. Marcus:

Q. Was there a provision in that contract relating to you not competing with Schine in respect to operating a theatre in Corbin?

Mr. Rogers: I object to that on the ground the contract is the best evidence, may it please the Court.

The Court: As I recall his testimony he testified he left all these papers with his son.

Mr. Rogers: Leon, yes, sir.

The Court: And his son testified that these are all the contracts.

Mr. Rogers: He is speaking about an entirely different paper. That paper has not been produced, nor has it been requested, nor is there any evidence as to whatever became of that, and I think before they can introduce any evidence [fol. 743] they have got to show there was such a paper and they have got to show it was lost.

The Court: It appears it was lost. He said he delivered it to the son and the son said he couldn't find it. I assume that was the other part of the contract signed.

Mr. Marcus: That is right, they should have it.

The Court: Was notice served on them to produce?

Mr. Marcus: We have asked them to produce that contract, your Honor.

Mr. McKay: We state unequivocally, your Honor, that there is no such contract.

Mr. Marcus: Do you want to put some one on the stand to so testify?

Mr. McKay: We don't have to.

Mr. Rogers: Will you kindly put somebody on the stand?

The Court: When do you claim this was made, Mr. Scott?

The Witness: Contract for Corbin?

The Court: The contract referred to, the contract for Corbin.

The Witness: There *were* more than one contract.

The Court: No, I mean other than the four you have here.

The Witness: I would like to see those four contracts.

The Court: You have examined them once.

The Witness: I didn't think there were but three when [fol. 744] he gave them to me.

Mr, Rogers: Mr. Scott would like to see those four contracts.

(Mr. Marcus hands the contracts in question to the witness and witness examines same.)

Mr. Marcus: Do you have your copy, Mr. Rogers?

Mr. Rogers: That is the one, Exhibit P-25 (handing Exhibit P-25 to Mr. Marcus).

By Mr. Marcus:

Q. You might look at this, Mr. Scott. This is a copy, or a document, which purports to be a copy of that contract with all the papers in it.

The Court: You are referring to what exhibit now?

Mr. Marcus: That is Plaintiff's Exhibit P-25.

The Witness: What I can't understand was this a separate contract from this one?

Mr. Marcus: That is right.

The Witness: Where is the beginning of this?

Mr. Marcus: That is why you might look at this one, it appears to be complete. (Plaintiff's Exhibit P-25.)

By Mr. Marcus:

Q. After going through these exhibits, Mr. Scott, P-25, P-20 and P-21, are you still of the opinion that there was at least one other contract which you turned over to your son, Mr. Leon Scott, relating to——

Mr. Rogers: I object to the form of the question.

[fol. 745] The Court: The form of the question is bad.

Q. Now, Mr. Scott, after reading these exhibits, Nos. P-21, P-20 and P-25, do you recall whether you turned over to your son, Mr. Leon Scott, any contracts in addition to these exhibits relating to Corbin?

A. I wouldn't consider it turning it over to him inasmuch as he possibly got the contract in the beginning, if there was one. He was a partner right in the contract.

Mr. Rogers: Pardon me. I move to strike as not responsive.

The Court: The question is whether you remember turning over to him a contract other than these three.

The Witness: All the papers were left——

The Court: You have not any recollection of a contract made between you and your son and the Schines except these three?

The Witness: That has been six years ago. I haven't a definite recollection.

By Mr. Marcus:

Q. Do you recall having made any other contract with the Schines in relation to Corbin, other than these three contracts marked P-21, P-20 and P-25?

Mr. Rogers: Pardon me. The witness has testified he has no recollection on the subject.

Mr. Marcus: He has no recollection of turning over such contracts.

[fol. 746] Mr. Rogers: Certainly if he has not he can have no independent recollection of making it.

The Court: Have you any recollection of any other contracts besides these?

The Witness: Not definite.

Mr. Marcus: That is all.

Mr. Rogers: That is all.

Abner C. Jones, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Rogers: Now, before this witness is interrogated, and to preserve the record, I wish to move with reference to the witness Grover C. Scott to strike his testimony on the ground that it is not binding on the defendants, on the ground that there has been no proper connection of the parties spoken to, of their authority, and on the further ground that his testimony relates to purely local situations.

The Court: Overruled.

Direct examination.

By Mr. Marcus:

Q. Mr. Jones, where do you reside?

[fol. 747] A. Harlan, Kentucky.

Q. What is your occupation?

A. Banker.

Q. Mr. Jones, are you an officer of the corporation which owns the New Harlan Theatre in Harlan, Kentucky?

A. I am Secretary-Treasurer of the Harlan Theatre Company.

The Court: New Harlan, isn't that the name?

The Witness: New Harlan is the name of the theatre, but the Harlan Theatre Company is the owner.

Q. Is Mr. Price Commer the tenant of that theatre?

A. He is.

Q. And was he the tenant in 1938?

A. He was.

Q. Mr. Jones, do you recall representatives of the Schines contacting you in reference to leasing that theatre, and if so would you place the time as near as possible?

Mr. Rogers: I object to the form of the question.

The Court: The form of the question, "representatives of Schines" makes the question improper in form. He may answer as to whether he had some talk about the leasing of this theatre with somebody at some time.

Q. Mr. Jones, did you have any conversation with persons other than Mr. Coomer in respect to the leasing of the New Harlan Theatre, either in 1938 or 1939?

[fol. 748] A. I can't recall the year. Mr. Lazar was in to see me, but I wouldn't attempt to place the year.

Q. You say that Mr. Lazar was in to see you. Will you state to the Court the substance of that conversation?

Mr. Rogers: Pardon me, may we try to have Mr. Jones give us some indication about the time when this conversation took place?

The Witness: Well, I am sorry. I am afraid that would be difficult. I have no way of fixing it, no record of any kind to refer to.

Q. Would you say that it was prior to 1941, Mr. Jones?

A. Yes, sir.

Q. Will you state to the Court the substance of that conversation?

Mr. Rogers: May it please the Court, I don't wish to seem to be too unnecessarily persistent, but I think we are entitled to a more definite date than some time prior to 1941.

The Court: Can you state any more definitely, Mr. Jones?

The Witness: It would be pretty much of a guess, but I should say between 1937 and 1939. That is a guess, if that is a help.

Mr. Rogers: Just a guess?

By Mr. Marcus:

Q. You do know, do you not, that it was not prior to 1937? [fol. 749] A. I believe it was since 1937. That would be my best recollection.

Q. Will you state to the Court the substance of that conversation?

A. Mr. Lazar wanted to know——

Mr. Rogers: No.

A. Well, Mr. Lazar said he represented the Schine interests and would like to talk to me about a lease on the theatre.

Q. That was with reference to the New Harlan Theatre, was it not?

A. That is right—the only one we have.

Q. Was Mr. Lazar on that occasion accompanied by any one?

A. I believe there was another gentleman with him, but I couldn't recall the name.

Q. At that time, at the time of that conversation, was Mr. Coomer your tenant?

A. Yes, sir.

Q. And his lease still had some time to run?

A. Yes, sir.

Q. Did this conversation relate to a lease to commence after the expiration——

Mr. Rogers: Now, Mr. Marcus, you are getting into your bad habits again. I object to it.

The Court: Let him tell when it refers to. State the conversation you had with Lazar.

[fol. 750] A. Well, that is about the content of the conversation with Mr. Lazar.

Mr. Rogers: One moment. I move to strike because the question has been stricken. Now let us have a question.

The Court: Yes, strike it out. Proceed, Mr. Marcus.

Q. Mr. Jones, on the occasion of your conversation with Mr. Lazar was there discussed at that time a lease——

Mr. Rogers: Pardon me. May it please the Court, I have three times asked Mr. Marcus to please frame the questions properly. Again he is trying to do the same old thing.

The Court: Finish the question.

Q. Was there discussed at that conversation the possibility of the Schines leasing that theatre at the expiration of the lease then existing?

Mr. Rogers: May it please the Court, I again object to the form of the question.

The Court: Objection sustained.

Mr. Rogers: I am going to ask your Honor to please request Mr. Marcus to frame his questions properly.

The Court: You will save a lot of time by letting the witness go ahead and state.

Mr. Marcus: Your Honor, he has already stated the conversation in respect to it covering a lease on that theatre. [fol. 751] Now I am trying to bring out what was said.

The Court: He said there was some talk about a lease. What was said?

The Witness: I think that is about all that Mr. Lazar—if the Court will permit me, I think Mr. Marcus is intending to ask me about Mr. Hensler. That is all as far as Mr. Lazar is concerned.

Mr. Rogers: Let Mr. Marcus handle that.

Q. Did you have any subsequent conversations with Mr. Lazar or Mr. Hensler in regard to the leasing of that theatre?

A. I did with Mr. Hensler.

Q. What was said at that conversation?

Mr. Rogers: Now let us — that conversation, as to when it was.

A. I think I can fix that more definitely. I would say the spring of 1942.

Mr. Rogers: Can we fix that date in the spring of 1942, may it please the Court, with more accuracy?

The Witness: I wouldn't attempt that because I have no records to which to refer to fix it.

Mr. Rogers: Can you give us the month?

The Court: Prior to May, was it, before May?

The Witness: I think it was in the spring of 1942. I think that is about as definite as I can try to make it.

[fol. 752] Mr. Rogers: May it please the Court, unless we can get these reasonably fixed with reference to the dead-line date in this case it would seem to me that it would be dangerous to allow this testimony in.

Mr. Wright: Mr. Rogers just got through asking Mr. Coomer what pictures he was playing today.

The Court: Proceed.

Q. What was the substance of that conversation, Mr. Jones?

A. Mr. Hensler asked me if we would be interested in making the Schine people a lease, and I told him that we had a tenant, a very satisfactory tenant, with some time to run; and then he wanted to know if we would be willing to consider making Schine a lease effective at the end of the lease held by Mr. Coomer.

Q. Was Mr. Hensler accompanied by any other person?

A. He came in with a local real estate man, Carl Noe.

Q. Did Mr. Noe make any statement to you in regard to leasing that theatre?

Mr. Rogers: Pardon. I object to that on the ground that there has no foundation been laid for that and no evidence as to the right of Mr. Noe to represent the defendant or make any statements.

The Court: Was it said when Hensler was there, do you mean?

[fol. 753] Mr. Marcus: Mr. Hensler was there.

A. That is right. I am not sure that I get your question.

By Mr. Marcus:

Q. Did Mr. Noe say anything at that time in the presence of Mr. Hensler in regard to the leasing of that theatre?

Mr. Rogers: I press the objection, may it please the Court.

The Court: I will receive it, subject to being stricken out.

A. I believe Mr. Hensler made the statement that plans were under way for enlarging the Margie Grand.

Q. And did Mr. Noe make any statement?

A. Not in the presence of Mr. Hensler. He did later, but I guess that would not be competent.

Q. Mr. Jones, who is your present tenant?

A. Price Coomer.

Mr. Marcus: Your witness.

Mr. Rogers: No questions. I move to strike the testimony of Mr. Jones on the ground, first, that it relates to a purely local situation, and on the ground that it is incompetent.

The Court: Denied.

[fol. 754] Richard DeToto, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kallis:

Q. Mr. DeToto, what is your present address?

A. Indian Town Gap, Military Reservation, Pennsylvania.

Q. What is your present occupation?

A. I am a Sergeant in the United States Army.

Q. Calling your attention, Sergeant DeToto, to the years 1931 and 1932, where were you residing?

A. I was residing in Geneva, New York.

Q. What were you doing?

A. I was attending the Geneva High School.

Q. Were you occupied with any kind of work in addition to attending high school, if that is work?

A. I was doing a little part time work for the Schine Theatres in Geneva, New York.

Q. You were working for the Schine Theatres in Geneva, New York; is that right?

A. Yes.

Q. During what period was that?

A. 1931 and 1932.

Q. Who was your immediate successor during the years [fol. 755] 1931 and 1932 while you were working for the Schine Theatres at Geneva, New York?

A. I don't follow you.

Q. Who was your employer or your superior?

A. I still don't know what you mean.

The Court: You asked him who his successor was. You did not mean that. You meant his superior.

Q. Who were you working for?

A. Clinton C. Young.

Q. What was his position with the Schines Theatres?

A. He was manager of the Geneva Theatre.

Q. Did he have at that time any additional duties with the Schine defendants?

A. I believe he was their District Manager.

Q. By District Manager what do you mean?

A. Well, he had supervision of the theatres in that immediate vicinity.

[fol. 756] Q. Now, Sergeant De Toto, calling your attention to the years 1934 and 1935, will you please tell the Court whether you had any connection with any theatre in Seneca Falls, New York?

A. In 1934, in July I was asked by Mrs.——

Mr. Rogers: One moment. A simple question calling for a simple answer. Did he or did he not?

The Witness: Yes, I took over the management of the Seneca Theatre in Seneca Falls, New York.

Q. And that was from July, 1934, until when?

A. June 30th, 1935.

Q. At the end of June in 1935, Sergeant De Toto, did you tell me your connection with the operation of the Seneca Theatre in Seneca Falls, New York, or did you continue?

A. I leased the theatre and continued operation.

Q. Who, at that time, was the owner of the building in which the Seneca Theatre at Seneca Falls, New York was located?

A. The Seneca Falls Savings Bank at Seneca Falls, New York.

Q. And were you given an oral or a written lease?

A. At the time the lease was consummated——

Mr. Rogers: One moment. I move to strike. The answer is simple.

Mr. Kallis: Will you read the question, Mr. Reporter?

(Last question read.)

The Witness: Yes, I was.

[fol. 757] The Court: Which was it?

The Witness: It was oral.

Q. Did you later receive a written lease from the Seneca Falls Savings Bank?

A. Later.

Q. For the Seneca Falls Theatre?

A. I received a lease.

Q. A written lease?

A. That is right.

Mr. Kallis: Mark this for identification, please.

(Thereupon paper, purporting to be a lease, was marked as Plaintiff's Exhibit P-46 for identification.)

Q. Sergeant De Toto, I show you Government's Exhibit marked P-46.

Mr. Rogers: No, Plaintiff's Exhibit, not Government's.

Mr. Kallis: I will stand corrected, Mr. Rogers. Thank you.

Mr. Rogers: This is a civil suit.

Mr. Kallis:

Q. I show you Plaintiff's Exhibit marked for identification No. P-46, and ask you if you have seen that before?

A. Yes, I have.

Q. From whom did you receive it?

A. Seneca Falls Savings Bank, Seneca Falls, New York.

[fol. 758] Q. Approximately what time?

A. Sometime in June, 1935.

Mr. Rogers: Objected to on the ground it is immaterial, not binding on the defendants, and also on the ground it relates to a purely local transaction.

Mr. Kallis: If the Court please, this a lease dated June of 1935, covering the leasing of this Seneca Falls Theatre at Seneca Falls, New York, for a period of a year beginning July 1st, 1935, and expiring June 30th, 1936, just a plain lease, with respect to the operation of the theatre.

The Court: Received. Renewal for the next year?

Mr. Kallis: No, sir, there isn't.

(Lease previously marked for identification as Plaintiff's Exhibit P-46 was received in evidence.)

Q. Sergeant De Tota, will you please tell the Court whether you operated the Seneca Theatre on your own account after July 1st, 1935?

A. Yes, I did.

Q. And for what period of time?

A. July 1st, 1935 to June 30th, 1936.

[fol. 759] Q. And you vacated the theatre on June 30th, 1936?

A. That is right.

Q. Are you acquainted with a man by the name of C. F. Marsh, in Seneca Falls, New York?

A. Yes.

Q. And what is his business?

A. He is the Treasurer of the Seneca Falls Savings Bank.

Q. After July 1st, 1935, when you began operating the Seneca Theatre on your own account, did you have any conversations with Mr. Marsh with reference to the purchase of the building in which the Seneca Theatre was located, or with reference to the renewal of the lease?

A. Yes, Mr. Marsh told me——

Mr. Rogers: Let us get the date of that, please.

Q. Please fix the date as clearly as you can.

A. It was at the time the lease was signed the first time. Is that what you have reference to?

Q. Yes, and who was present.

Mr. Rogers: May it please the Court, I object to that as incompetent, immaterial and not binding on the defendants.

Mr. Kallis: If the Court please, I think I can later show the connection between this testimony that I have in mind [fol. 760] and what Sergeant De Toto's testimony later will be.

The Court: You are referring now to a conversation between the witness and Marsh?

Mr. Kallis: That is right, who is Treasurer of the Seneca Falls Savings Bank.

Mr. Rogers: March of which year?

Mr. Kallis: 1935.

Mr. Rogers: When was the conversation?

Mr. Kallis: He said it was the time the lease was signed.

Mr. Rogers: If the conversation was had at the time the lease was signed, may it please the Court, then I object to it upon the ground all conversations and all transactions were merged in the lease.

The Court: It might be so, or it might not be so. Are you referring now to the second lease?

The Witness: No. When I signed the lease I objected on the grounds——

Mr. Rogers: One moment.

The Court: I just ask you, are you referring to the time you had this talk with Marsh, are you referring to the time of the second lease?

The Witness: No, I only had one lease. I had several conversations with Mr. Marsh. This is the original.

[fol. 761] The Court: That is what I am getting at. You said this was after you made the written lease.

The Witness: This was an oral agreement or conversation in addition to the lease.

The Court: When did you say this conversation was?

The Witness: It happened at the time this lease occurred, June 3rd, 1935.

Mr. Rogers: May it please the Court, the witness said that this was a conversation of some arrangement in addition to the lease. If done at that time, then that conversation would be merged in the lease, and I object to it.

The Court: I will see what he says. Of course, anything relating to the contract is merged in writing.

Mr. Kallis: That is right.

Mr. Rogers: And, of course, any conversation he had with Mr. Marsh would not be binding on us.

The Court: Again I accept counsel's statement it will be connected up. Standing by itself alone it cannot be competent. Go ahead.

Q. What was the substance of the first conversation you with Mr. Marsh relative to the Seneca Theatre in Seneca Falls, New York?

Mr. Rogers: Will you give us the date?

[fol. 762] The Court: He said in June.

The Witness: June 3rd, 1935.

Mr. Rogers: He said the first conversation. It does not necessarily mean when he made his lease, whenever he spoke to Mr. Marsh long before that.

Q. To save the time of everybody, I will waive the questions in respect to the first conversation. Pursuant to this lease, did you take possession of the Seneca Theatre?

A. I did.

Q. When was that?

A. July 1st, 1935.

Q. Did you continue operating the theatre through to June 30th, 1936?

A. I did.

Q. After you took possession of the theatre on your own account, did you have any conversations with Mr. Marsh concerning the theatre?

A. Yes, I did.

Q. Will you please tell the Court when the first conversation took place and where?

Mr. McKay: Wait a minute. That is objected to on the same grounds previously stated, no conversation between [fol. 763] the witness and Mr. Marsh can possibly be binding on this defendant.

The Court: It went in before. Unless Mr. Marsh's authority is shown it wouldn't be competent, but I will accept the statement of counsel that he will connect it up.

Mr. Kallis: If the Court please——

The Court: I am with you. I will rule on the objection with that understanding on your part; Marsh's connection will be shown with the defendant Schine. It will be perfectly competent.

Mr. Kallis: I have that in mind and will let your Honor pass on the competency of it now.

The Court: No, if you connect Marsh up with the authority to make the statement he made to connect the defendants, then I will receive it.

Mr. Kallis: I haven't that line of testimony in mind. What I have in mind with regard to this particular question that there was an oral understanding that Mr. De Toto——

Mr. Rogers: Pardon me, Mr. Kallis, for interrupting you. I don't want you to get in bad habits like Mr. Marcus and Mr. Wright. Don't tell us what you are hoping to do and not do it later on.

The Court: You propose to show what?

[fol. 764] Mr. Kallis: I propose to show that there was a continuous understanding and an oral agreement between Mr. De Toto and the Seneca Falls Savings Bank with reference to a first option, either for both the sale or the renewal of this lease when the lease expired on June 30th, 1936, and that without any prior notice of any kind, the Schine defendants went in there and bought this building away from this witness without giving him an opportunity of any kind to purchase. Then there are other incidents connected with that testimony that indicates that the conduct of the Schine defendants was not at all casual or accidental, but intentional.

Mr. Rogers: May it please the Court, if that is the purpose of the offer of proof, I certainly object to it, first on the ground, if there was any agreement of that kind, it is merged in the lease, it is not contained in the lease which is offered in evidence, and if anything was done thereafter, it cannot be used to contradict the terms of a written agreement.

Mr. Kallis: This is also, if the Court please, an oral [fol. 765] option in reference to the purchase of the building.

The Court: Of course, an option is not binding on anybody.

Mr. Rogers: No.

Mr. Kallis: The Schine defendants can't raise the Statute of fraud as a defense to this as far as the bank is concerned.

The Court: How are you going to show Schine knew anything about it?

Mr. Kallis: I am going to show that, if the Court please, by this witness.

The Court: That Schine knew of the transaction?

Mr. Kallis: Yes.

The Court: Go ahead.

Mr. Kallis: I am trying to, but Mr. Rogers continues making these objections.

The Court: I will let you show what talk there was between he and Schine in reference to the option.

Q. Calling your attention, Sergeant De Toto to the period during which you were in operation of the theatre, did you have occasion to see Clinton C. Young at the Seneca Theatre in Seneca Falls, New York?

A. Some time in August.

Q. Just answer "Yes" or "No."

[fol. 766] A. Yes.

Q. When was that?

A. Some time in August, 1935.

Q. And where was that with reference to the theatre?

A. I was operating that as I was running my own projection machines that evening, it was the projectionist's night off.

Mr. Rogers: I move to strike everything up to the present as not responsive.

The Court: Yes. When did you see him?

The Witness: Clinton C. Young came up to the projection room of the Seneca Theatre in Seneca Falls, New York.

Q. What month was that?

A. August, 1935.

Q. Will you please tell the Court what conversation you had with him exactly on that occasion?

A. Clinton Young came up in the booth and said, "Dick, I just heard you took this theatre over. I didn't know that. Whom do you have working for you, your family?" He asked me how long a lease I had, and, of course, I gave him all the information. He wanted to know how much I was paying for pictures. He said, "Don't pay more than $7.50 for pictures." He said "You have a pretty good light on your screen, and I wish you lots of luck," and I believe [fol. 767] that was about all.

Q. Did you tell him specifically when your lease expired?

A. That is right.

Q. What did you say?

A. I told him I had a year's lease, but the banker had assured me of——

Mr. Rogers: One moment. May it please the Court, I definitely say we have the right to rely on the Statute of fraud, because if they claim here the legal right of this man was invaded, they must show he had a legal right.

Mr. Kallis: If the Court please, I am trying to elicit from this witness the conversation he had with the division manager of the Schine Theatres, the defendants in this case, and he was in the process of telling your Honor the conversation he had with Clinton C. Young, the division manager of the Schine defendants, when Mr. Rogers interrupted.

Mr. Rogers: Because you have the peculiar habit in relating conversations of that kind to get in other matter that you know is not competent, and that is why I object to it.

The Court: I will let him state the conversation.

The Witness: Your Honor, Clinton C. Young came to the [fol. 768] projection room——

The Court: We got that far. What further was said? You told about numerous things, he spoke about—what did he say and what did you say to him?

The Witness: I told Clint I had taken the theatre over and I had a year's lease, but the banker had assured me an extension the first of July, and I was being cautious in my film contracts, and I thought I could make a go of it, and that was all. He said "Good luck, Dick." And he left.

Q. Was there anything said in this conversation, Mr. De Toto, as to how much was mentioned between yourself and the bank with regard to the purchase price of this option? You said it was discussed with Mr. Young?

A. No, I don't recall.

Mr. Rogers: One moment. I don't understand this witness testified to any such thing.

The Court: No.

Mr. Rogers: He said "No." Let it stand.

Q. Will you please describe the Seneca Theatre with respect to the location first?

A. It is located on the main street.

Q. What size house was it?

[fol. 769] A. 350 seats.

Q. Did it have all facilities that were necessary with the operation of the moving picture theatre?

Mr. Rogers: Let us find out what the facilities were.

Q. Please tell the Court what they were.

A. I don't quite follow you. We had seats, if that is what you mean.

Q. What else?

A. Projection equipment, screen, had rest rooms, heating plant.

Q. How often during the week did the theatre run?

A. All week, every night, matinees.

Q. Matine- and evening performances?

A. That is right.

Q. Every day during that year?

A. Every day.

Q. What admission prices were you charging at the Seneca Theatre?

A. 10 and 15.

Q. At that time, Mr. De Toto, were there any other theatres in town?

A. Yes.

Q. What was the name?

A. Strand Theatre.

Q. The Strand and the Seneca were the only two theatres [fol. 770] in Seneca Falls, New York, at that time?

A. That is right.

Q. And who was operating the Strand Theatre in July of 1934, when you came there to manage the theatre?

A. The Bernstein Brothers, of Ithaca, New York.

Q. Can you tell the Court whether there was any change in operation of the Strand Theatre during the two years you were there from July, 1934, through June, 1936?

A. Yes, there was.

Mr. McKay: Did he say it was being operated by the Bernsteins?

Mr. Rogers: Yes.

Mr. McKay: That is all immaterial.

Mr. Kallis:

Q. What, if any change in operation, occurred in the Strand Theatre during those two years?

A. Schine acquired it in September, 1935.

Q. At the time the Strand Theatre was being operated in 1934 and 1935 by Bernstein Brothers what was the admission price?

A. Ten cents for children and 25 cents for adults.

Q. Was there any change in the admission price of the Strand Theatre after the Schine defendants took over the Strand?

A. No, there wasn't, not during my operation.

Q. They continued charging 25 cents?

[fol. 771] A. That is right.

Q. With reference to the business that you did at the Seneca Theatre, can you tell the Court just in general terms, whether the audience occupied the full house, or how business was?

A. It was a fair business.

Q. Did you sell out at all on any evening?

A. Quite occasionally.

Q. What was the size of the Strand Theatre?

A. 900, about 900 seats.

Mr. Kallis: Please have that marked as Plaintiff's Exhibit P-47 for identification.

(Thereupon a letter dated April 28, 1936, referred to, was marked as Plaintiff's Exhibit P-47 for identification.)

Q. Calling your attention to the month of April, 1936, did you have a conversation with Mr. Marsh relative to a renewal of this lease?

A. Yes, I did.

Q. And what and when was that?

A. It was in the early part of April, 1936.

Q. Where?

A. In the Seneca Falls Savings Bank, Seneca Falls, New York.

Q. What was the substance of the conversation between [fol. 772] you and Mr. Marsh on that occasion?

Mr. Rogers: May it please the Court, I object to that on the ground it is immaterial, not binding on us, and no authority shown on behalf of Mr. Marsh to bind the defendants, and on the ground it relates to purely local transactions.

The Court: Overruled.

Q. Please answer the question.

A. Your Honor, I went in to see Mr. Marsh in the Seneca Falls Savings Bank, and I told him the lease had a few more months, and I would like a renewal, that I would buy the building if he insisted on it. He also quoted the price to me at the time of $9,000. He said all cash wasn't necessary, could carry a balance on mortgage, but I told him I would much prefer to spent the little money I had to remodel the theatre, and that if he would play along with me, on another year's lease, that I would buy the building the following year, and he agreed. He said, "Don't worry, Dick. We will play along with you. You promised to buy the building the next year." As a matter of fact, Mr. Marsh came down to the Seneca Theatre and I showed him what I had in mind. As a matter of fact, he even took me up to his church and showed me some rubber runners which [fol. 773] he thought would be cheaper and much better than carpet.

The Court: Of course, that is not responsive to the question. He asked about the talk you had with him at the Seneca Falls Savings Bank.

The Witness: Yes.

The Court: And talked renewal and talked about the purchase and talked about repairs.

Mr. Kallis:

Q. What is the next notice that came to your attention, Mr. De Toto, with reference to any change of ownership of the Seneca Theatre Building?

A. The Saturday preceding the date of that letter which is April 28th, I couldn't find a calendar.

Q. One moment. Showing you Plaintiff's Exhibit P-47 for identification, is that the letter you just referred to?

A. That is right.

Q. All right, proceed.

A. The Saturday preceding that letter which is dated April 28th, 1936, Mr. Gus Hughes, who is President of Businessmen's Association, who is located across the street from the Seneca Theatre, called me over and said——

Mr. Rogers: One moment. May it please the Court, I certainly object to that on the ground that — can't possibly be material.

Mr. Kallis: I think Mr. Rogers' objection is well taken there, and I am willing to stipulate that it goes out.

Mr. Rogers: My gracious, I am overcome.

[fol. 774] Q. You had a conversation with Mr. Hughes and then what did you do?

A. Well, I have got to tell you what he told me.

Mr. Rogers: No, that is what you don't tell.

Q. Tell us what happened after you had this conversation.

A. I immediately rushed up to the Seneca Falls Savings Bank and was instructed that Mr. Marsh was upstairs in the bank. I immediately rushed upstairs, knocked on the door. The door opened and I saw Clinton C. Young and several attorneys and Mr. Marsh came out, and I had to back up in front of them. I said to them, "What are you doing, selling me out without giving me a chance?" He blushed and twinkled with his fingers and he said "We are not exactly sure whether we are going to sell." He said, "We will let you know."

Q. Your attention has been directed to Plaintiff's Exhibit 47. Did you receive this exhibit?

A. Yes, I did.

Q. By what means?

A. By mail.

Q. On or about the date that it bears, April 28, 1936?

A. That is right.

Mr. Kallis: I will offer in evidence Plaintiff's Exhibit 47 for identification.

Mr. Rogers: I object to this. May it please the Court, on [fol. 775] the ground that it is not competent, on the ground that it is not binding on the defendant Schine, being a letter from Mr. Marsh to the witness DeToto.

The Court: With reference to what?

Mr. Kallis: The payment.

The Court: Overruled. Received.

(Thereupon the letter referred to previously marked Plaintiff's Exhibit P-47 was received in evidence.)

Q. Now, pursuant to this Exhibit, Plaintiff's Exhibit 47, a letter from the bank to you notifying you that the Schines had bought the Seneca building, did you pay your rent for the month of May and the month of June, of 1936, on the theatre?

A. Yes, I did.

Q. To whom did you pay the rent?

A. To Leon Schafer, the Manager of Schine's Strand Theatre, Seneca Falls, New York.

Q. Were you acquainted prior to April 28, 1936, with Leon Schafer?

A. Yes, I was.

Q. Had you seen him on many occasions?

A. Yes, I had.

Q. And had you visited him at the Strand Theatre?

A. I had.

[fol. 776] Q. When did he come to Seneca Falls, by the way?

A. I don't know the exact date, but it was shortly after Schine acquired the Strand in September, 1935.

Q. When was the first time that you paid rent to Leon Schafer on the Seneca Theatre?

A. I don't recall the first time exactly. It was some time in May.

Q. What year?

A. 1936.

Q. And did you have a conversation with Mr. Schafer concerning the Seneca at the time you paid him the rent?

A. I did have a conversation with Mr. Schafer after receiving that letter, after I had known that Schine had the Seneca Theatre.

Q. Was that on the first occasion of your paying rent to him for the Seneca?

A. I don't recall whether it was or not. It was shortly after I received that letter.

Q. What was the conversation?

Mr. Rogers: One moment. May it please the Court, I object to that on the ground that there is no foundation laid to show any authority on behalf of Mr. Schafer.

The Court: What was his business there—Schafer's business?

The Witness: He was the manager for Schine of the theatre.

[fol. 777] The Court: Objection sustained.

Mr. Kallis: If the Court please, this witness testified that he paid rent to Mr. Schafer, and that places him in apparent authority, at least with respect to this building, and I think that automatically shifts the burden as far as these defendants are concerned. If Leon Schafer was an employee of the Schine defendant, if he didn't have this authority they can come in——

The Court: The mere authority to collect rent or manage the theatre does not show his authority to bind the defendant by some act. It does appear he paid rent to him. You can ask him about paying the rent to Leon Schafer.

Mr. Kallis: Your Honor is contemplating the very question I have in mind.

Q. Did you see Clinton Young in Seneca Falls between April 28, 1936, and July 1, 1936?

A. Yes, I did.

Q. Will you tell the Court what was the occasion of your paying rent to Leon Schafer instead of Clinton Young?

A. That has no bearing on that.

Q. Just answer the question, if you can, Mr. DeToto. How did it happen that you paid the rent to Leon Schafer?

[fol. 778] A. It seems I received a letter from Clinton Young, or someone, that he would be unable to collect the rent.

Mr. Rogers: If there is a letter let us have the letter.

Q. Do you have that letter in your possession?

A. I destroyed it.

The Court: He had a letter from Mr. Young to pay the rent to Schafer.

Mr. Rogers: Is that all you want to prove by that?

Mr. Kallis: Yes.
Mr. Rogers: Well, that is all right.

Q. You stated that this letter said you should pay the rent to Leon Schafer?
A. I believe it did. Words to that effect, anyway.
Q. Did you have any conversation with Mr. Schafer relative to a renewal of this lease?
A. Yes, I did.

Mr. Rogers: One moment, may it please the Court. I object to that on the ground that Schafter has not as yet been identified as anybody having authority to discuss leases or the making of leases. By his own testimony up to the present Schafer is merely a chap to receive rent. He might just as well pay the cashier or the ticket chopper in the theatre.

Mr. Kallis: If the Court please, the testimony so far is [fol. 779] that the Schine defendants became the owner of this theatre building in April of 1936, that the only representatives of the Schine defendants in the city of Seneca Falls, N. Y., the only representative was Leon Schafer who was managing the Strand Theatre, and who received the rent.

Mr. Rogers: Now we have got Mr. Kallis testifying. Mr. Kallis says that he is going to show that Mr. Schafer was the only representative of the Schine Company at Seneca Falls. I want that stricken, may it please the Court.

The Court: Supposing he were the only representative, that would not show authority. All the evidence is that he was the manager of the theatre. There is no implication that there was any authority to bind Schine with relation to acts in the purchase of a theatre unless you can assure the Court that you are going to show the authority of Mr. Schafer to make certain statements or certain agreements with the witness. Standing alone it is not sufficient that he said something about what his employer was going to do.

Mr. Kallis: I don't want to be captious, if the Court [fol. 780] please. I am really trying to save time. Your Honor knows that. I think that his connection with the Strand Theatre and his connection with the Schine defendants in general with reference to collecting rents on the Seneca would clothe him with the apparent authority with

regard to the charge of that building in Seneca Falls. Somebody would have to have charge of that building.

The Court: Supposing he did have charge of the building, then what?

Mr. Kallis: If he had charge of the building then certain statements that he made concerning the prospective use of it would be competent. That is all I am trying to elicit.

The Court: Objection sustained. I don't think it is sufficient to show authority.

Mr. Kallis: Furthermore, I think it would be part of the res gestae under the circumstances. This man goes to the authorized collecting agent of the Schine defendant, pays the rent on several occasions, and certain statements were made with reference to the future use of the building.

Mr. Wright: If the Court please, to save time, could it [fol. 781] not be taken subject to being stricken if there is not any proper showing of authority made? This man is going back to the Army camp and we wouldn't want to have to call him back for more testimony after we put on the Schine defendants.

The Court: If you can assure me that this connection will be made I will receive the testimony.

Mr. Rogers: I want a definate promise on that.

Mr. Wright: What we would be able to show is that Schafer was the representative of the Schine defendants in that particular town.

The Court: You do not claim the testimony at the present time, standing alone, is sufficient? The testimony that this man Schafer was manager of the other theatre and collected rent on the Seneca Falls would not imply the authority to bind Schine as to future actions.

Mr. Wright: I would say as far as that building goes, in the absence of any other representative in the town I presume that is at least prima facie authority to deal for Schine on those premises was in Schafer, on the basis of what is in the record. As I say, we may be able to develop additional [fol. 782] authority on a later date, but in any event I think this testimony should be received so that if we do not it can be stricken; if we do we can then take it.

Mr. Rogers: May it please the Court, Mr. Wright's statement again is that we may be able to gamble on this man's testimony. We are entitled to an absolute assurance by the plaintiff that they will connect.

Mr. Wright: What harm will be done?

Mr. Rogers: Because there has been too much of this stuff in the record now.

The Court: Objection overruled. I will receive it.

Mr. Kallis:

Q. Calling your attention to the first conversation you had with Leon Schafer after the Schine defendants bought the Seneca Theatre, please tell the Court what was said.

Mr. Rogers: And when was the conversation?

The Witness: It was shortly after this letter, some time in the early part of May, 1936, in the lobby of Schine's Strand Theatre. Mr. Leon Schafer was there. He was leaning up against the rail in the ticket office. I walked up to him and said, "Leon, how about renewing my lease?" He said—in more or less his own words—"Are you kid-
[fol. 783] ding?" He said, "Schine don't buy theatres to rent them, he wants to close up the Seneca Theatre. He does not want any competition in Seneca Falls."

Mr. Rogers: May it please the Court, I move to strike that on the ground that there is no evidence at all to prove that this man is authorized to make any statement such as the statement testified to as to the policy of Schine with reference to their theatres, bearing in mind, your Honor, that this lease only had about a month and a half to go at that time on this theatre, and all this man Schafer did was to receive rent. I do maintain that this is going beyond anything that the Government hopes to connect, and I don't think you will get an honest assurance that they will connect it. Mr. Wright would not give it to us.

The Court: It is clearly incompetent, in my judgment, unless the authority is shown in Schafer to make such a statement. He states what he claims to be the policy of Schine.

Mr. Wright: Schine's policy in Seneca Falls is necessarily made by the man who manages Schine's property there.

[fol. 784] Mr. Rogers: Nonsense.

The Court: I will let it stand that he tried to rent again of Schafer and Schafer refused to rent it.

Mr. Rogers: Of course I have already objected to that, may it please the Court, and that was to be done subject to connecting Schafer's authority to even talk about granting.

The Court: I will receive it. I want it clearly understood that I do so with much hesitation. I have no doubt about it being incompetent unless it is further connected.

By Mr. Kallis:

Q. Mr. DeToto, when Mr. Schafer told you, in substance, that you could not renew this lease on the Seneca did you take any steps of any kind with reference to the building of another theatre in Seneca Falls, N. Y.?

A. Yes, I did.

Q. And whom did you see?

A. A Mr. Barney McDermott.

Q. When was that?

A. Shortly after my conversation with Leon Schafer.

Q. Can you give us the month and year?

A. It was in May.

Q. Of what year?

A. 1936.

Q. Pursuant to your discussions with Barney McDermott [fol. 785] can you tell the Court whether a site for——

Mr. Rogers: Please, let us find out what was done.

The Court: Let him say what he did.

Q. Please tell the Court everything that occurred with respect to that subject.

A. Mr. McDermott had an old laundry building on the main street in Seneca Falls, from which he was deriving no revenue, and he and I thought it would make a splendid theatre location, and we worked out an arrangement. He hired an architect, plans were drawn up and approved by the State at Albany.

Mr. Rogers: One moment. I object to this witness testifying as to plans or approval of plans unless we have the proper evidence——

The Court: I will let it stand. I think that is a statement of fact, that plans were drawn.

Mr. Rogers: And he said "and approved."

The Court: "Approved" may go out. Plans were prepared.

Mr. Kallis: Please mark that as Plaintiff's Exhibit 48 for identification.

(Thereupon the plans referred to were marked as Plaintiff's Exhibit P-48 for identification.)

(Thereupon the specifications referred to were marked as Plaintiff's Exhibit P-49 for identification.)

[fol. 786] (Thereupon the newspaper, Seneca County Press, June 17, 1936, referred to was marked as Plaintiff's Exhibit P-50 for identification.)

Q. Mr. DeToto, with reference to the proposed theatre concerning which you have just testified, can you tell us the name of the architect?

A. Lloyd B. Adams.

Q. Did you have any discussions with Mr. Adams concerning the proposed theatre?

A. Yes, sir.

The Court: Why is it necessary to go into this? It is not disputed here. He said plans were drawn, and he said by whom they were drawn. I don't think the question of the details of the plans is necessary at this time unless there is evidence later to contradict it. If that is material you may show the plans. He testified plans were drawn.

Q. Showing you Plaintiff's Exhibit 48 for identification, will you please tell the Court what that represents?

A. These are the plans for the new theatre that Barney McDermott was going to open in Seneca Falls.

Q. Showing you Exhibit 49 for identification, will you please tell the Court what that exhibit represents?

A. These are the specifications for the same theatre.

[fol. 787] Mr. Kallis: I offer them in evidence, if the Court please.

The Court: It seems to me unnecessary to cumber up the record with the plans. He has testified that the plans were prepared.

Mr. Rogers: I do object to it, may it please the Court, on the ground that it is immaterial. It is not binding on us. And on the ground it relates to an isolated local transaction.

The Court: I think they are competent, although I think they are cumulative, unless it is disputed that plans were drawn. I will receive them but I don't think it adds anything to the testimony.

Mr. Rogers: My objection is as to both of these proposed exhibits.

The Court: Very well.

Mr. Kallis: Your Honor has received 48 and 49?

The Court: Yes.

(Thereupon the plans referred to previously marked as Plaintiff's Exhibit P-48 for identification were received in evidence.)

(Thereupon the specifications referred to previously marked as Plaintiff's Exhibit P-49 for identification were received in evidence.)

[fol. 788] Q. Mr. DeToto, I show you what is marked as Plaintiff's Exhibit 50 for identification. After the Schine defendants purchased the Seneca Theatre can you testify as to whether or not there were any signs posted in the theatre or in front of the theatre, prior to the time you vacated on June 30, 1936?

A. No.

Q. Your answer is that there were no signs of any kind posted?

A. That is right. Not by Schine.

Q. Now I show you what has been marked as Plaintiff's Exhibit 50 for identification and ask you whether you have seen that exhibit before?

A. Yes, I have.

Q. And where did you obtain it?

A. From the office of Seneca County Press in Seneca Falls, New York.

Mr. Kallis: I offer that in evidence, if the Court please.

Mr. Rogers: May it please the Court, this is absolutely incompetent and irrelevant. This is a news item in a paper. It does not show who it emanates from, who wrote the article.

Mr. Kallis: It does. It shows an annouceement was made by Clinton C. Young, the representative of the Schines.

Mr. Rogers: Will you please let his Honor see that [fol. 789] article, without you reading it into the record and describing it?

The Court: Why do you object to it?

Mr. Rogers: It is incompetent, not binding on us, no proof that it emanated from the defendants.

The Court: What do you claim its probative force is? What do you seek to show by it?

Mr. Kallis: That this announcement was made with respect to the future use of the Seneca Theatre and that as a direct result of this announcement Mr. DeToto's plans with reference to the construction of a third theatre in Seneca

Falls were dropped because of the fact that the town in his opinion would not support three theatres, and that when his plans were dropped the Schines never went through with the announced plan of remodeling and opening this theatre, and that it has been vacant ever since June 30, 1936, when Mr. DeToto left the theatre, and that there has been only one theatre operating in Seneca Falls ever since and that is the Strand.

Mr. Rogers: That is all very interesting testimony on behalf of Mr. Kallis. I congratulate him on being a good [fol. 790] witness, but there is not anything probative in it, and there is no such testimony in the record, and I would like to get the testimony of a witness.

Mr. Kallis: As an attorney at law, if the Court please, I say in seriousness and sincerity that I think I can make that connection. I think I can do it right now,—if Mr. Rogers is very uneasy about it.

Mr. Rogers: That still would not make a newspaper article probative.

The Court: It is purely hearsay. Objection sustained.

Q. After you vacated on June 30, 1936, did you see any sign of any kind on the Seneca Theatre that was not there during your occupancy of it?

A. Yes, I did.

Q. Please tell the Court what that sign was.

A. On the morning of July 1, 1936, on the Seneca Theatre two Schine employees hung up a great big sign over the top of the entrance which read, "Closed for alterations. Will reopen soon."

Mr. Rogers: One moment, Sergeant. I object to that testimony.

The Court: Sustained.

Mr. Kallis: If the Court please, here is a building——

Mr. Richardson: If the Court please, may I inject that we not put on this record over and over again speeches which [fol. 791] will go into the permanent record and may be read hereafter on something that will never be put in proof?

Mr. Kallis: Here is a situation where the Schine defendants are completely in control and possession of this building, and here a sign appears in front of the building. It has in mind the future operation and remodeling of it. If that is not sufficiently connected in point of control of the building I don't know what would be.

The Court: I will let him state. Were you occupying the premises still at that time?

The Witness: I had vacated the night before, the very night before.

The Court: I will let him state what the sign said.

Q. What did the sign say, Dr. DeSoto?

A. I was there when they were hanging it up.

The Court: What did it say?

A. It said "Closed for alterations. Will reopen soon as a Schine Theatre."

Q. Did you see any remodeling taking place?

A. Not at that particular time.

Q. Do you know whether the Seneca Theatre has ever been operated since you vacated it on June 30, 1936?

[fol. 792] A. It never has.

Q. It has been closed continuously?

A. That is right.

Q. What, if anything, did you and Mr. McDermott and the architect do with reference to this proposed theatre after you saw that sign posted in front of the Seneca Theatre?

A. Well, we had become discouraged when we first saw the paper——

Mr. Rogers: One moment. I move to strike that.

The Court: Yes.

Q. Did you go ahead with your plans about constructing a theatre as you have testified before?

A. No, we did not.

Q. What did you do?

A. We were discouraged——

Mr. Rogers: Just a moment.

Mr. Kallis: That is a conclusion and I will move to strike it also. It is unanimous.

A. We did nothing.

Q. Now, calling your attention to the month of June in 1938, did you renew your efforts or renew your plans with reference to the construction of a new theatre building in Seneca Falls, New York?

A. Yes, I did.

[fol. 793] Q. Whom did you discuss the matter with?

A. A Mr. Mervin Nearpass of Seneca Falls, New York.

Q. And did you have discussions with any architect at that time?

A. Yes.

Q. What was the name of the architect?

A. Lloyd B. Adams.

Q. The same architect whom you had before?

A. That is right.

Q. What, if anything, did you do with reference to the construction of a new theatre building in Seneca Falls, New York, in June of 1938?

A. We planned on converting a garage into a theatre that Mr. Nearpass owned.

Mr. Kallis: Now mark that as P-51 for identification.

(Thereupon the blueprint referred to was marked as Plaintiff's Exhibit P-51 for identification.)

Q. Now I show you Plaintiff's Exhibit P-51 for identification and ask you whether you have seen that before?

A. Yes, I have.

Q. And are these the plans which were drawn at that time in 1938 with reference to the theatre that you and Mr. Nearpass were contemplating?

A. They are.

[fol. 794] Mr. Kallis: I offer them in evidence, if the Court please.

(Short recess taken.)

Mr. Kallis: I make the offer with respect to the second set of plans.

Mr. Rogers: I object to them on the ground they are incompetent and not binding on the defendant, and on the ground it relates to a purely local transaction.

The Court: Received.

(Thereupon the blueprint referred to previously marked as Plaintiff's Exhibit P-51 for identification was received in evidence.)

Q. Now, Mr. DeToto, calling your attention to the first two weeks in July of 1938, was anything brought to your attention with respect to any announcement that had been made concerning the reopening of the Seneca Theatre in Seneca Falls?

Mr. Rogers: May it please the Court, I object to that on the ground that it calls for a conclusion, on the ground that it asks this witness to testify as to the contents of some writing or some announcement not before the Court.

Mr. Kallis: If the Court please, Mr. Rogers' objection [fol. 795] is not well founded, in my opinion, because the question calls for a simple answer yes or no, and if he gives the answer yes, as far as that answer is concerned, the defendants have not been harmed at all, and it is just a preliminary and a collateral matter to testimony which is to follow.

Mr. Rogers: Except that Mr. Kallis has characterized the nature of the writing in question as some sort of a notice purporting to do so-and-so.

The Court: Overruled.

Mr. Kallis: Will you read the question?

(Last question read.)

A. Yes.

Q. Will you please tell the Court what that was?

Mr. Rogers: Now, may it please the Court, I do press my objection on the ground that it is incompetent; on the ground it is not binding on us, and on the ground that it calls for the contents of some written instrument or paper not before the Court.

[fol. 796] Mr. Kallis: Perhaps I can expedite the hearing by asking this question:

Q. Was the notice that came to your attention oral or written?

A. Written.

Q. And in what form, Mr. De Toto?

A. Newspaper announcement.

Q. Did you have any conversation with Mr. Shafter in July, 1938, with reference to the Seneca Theatre?

A. Not until July, 1938.

Mr. Kallis: I have, if your Honor please, the same situation with respect to three other newspaper announcements. I presume your Honor is holding that they are incompetent unless I can make the connection later. I think I can, your Honor. I would like to have these newspaper announcements received, subject to being connected later, perfectly willing if I can't make the connection, that the evidence of these newspapers items go out.

Mr. Rogers: It can be marked for identification, and let it appear from the record that these so-called announcements are just news items, not announcements.

[fol. 797] The Court: It is hearsay up to the present, anyhow. You can mark them for identification.

(Thereupon the newspaper containing the announcement referred to, was marked as Plaintiff's Exhibit P-52 for identification.)

Q. Mr. De Toto, I show you what has been marked as Plaintiff's Exhibit P-52 for identification, purporting to be page 1 of the Seneca County Press, Seneca Falls, New York, for Wednesday, July 13th, 1938, and ask you whether that came to your attention?

A. Yes, it did.

Q. When?

A. On that date.

Mr. Kallis: I offer Plaintiff's Exhibit P-52 for identification, subject to being connected later, if the Court please.

Mr. Rogers: I object to it on the ground it is hearsay.

The Court: Sustained. It is marked for identification.

Mr. Kallis: You are sustaining the objection?

The Court: Yes, it is hearsay at this time.

Q. Did you hear any discussion at all, Mr. De Toto in Seneca Falls, in the first two weeks of July, 1938, relative to the Seneca Theatre being re-opened?

Mr. Rogers: One moment. I object to that as hearsay, [fol. 798] not binding on us in *no* manner, and incompetent.

The Court: Sustained.

Q. Did you go through with your plans for you and Mr. Nearpass to construct the theatre building, the plans of which have already been received in evidence?

A. No.

Q. Did you see any signs on the Seneca Theatre in the month of July, 1938, with reference to the re-opening and remodeling of the Seneca Theatre?

Mr. Rogers: I object to that as incompetent.

The Court: Didn't he testify to that before?

Mr. Kallis: That was in 1936, your Honor. This was two years later following the obtaining of plans.

The Court: Well, I will receive that. Did you post a notice?

The Witness: Yes, sir, I did.

Q. Will you please tell the Court what that announcement on the theatre stated?

Mr. Rogers: One moment. I object to that as hearsay.

The Court: Overruled.

Mr. Rogers: Not binding.

The Court: No; I think that is competent.

The Witness: The sign stated that the Seneca Theatre would be opened on August 20, 1938.

Q. Do you know whether the Seneca Theatre opened in [fol. 799] August, 1938?

A. No, it did not.

Q. Has the Seneca Theatre been operated at all since June 30th, 1936?

The Court: He has answered that before.

Q. When you vacated it?

Mr. Kallis: All right, I was not sure, your Honor, that I had the answer.

Q. Will you please state how many pictures you played a week during the time you operated the Seneca Theatre from July 1st, 1935, through to June 30th, 1936?

A. About five or six features a week.

Q. What is the size of Seneca Falls, New York, approximately?

A. Between six and seven thousand population.

Q. How long to the best of your knowledge, was the Seneca Theatre operated immediately prior to the time, to July 1st, 1936, how many years, if you know?

A. Two years that I am sure of.

Q. Do you have any knowledge as to its being operated prior to that time?

A. I do, but don't know the date.

Q. Give us an approximate idea in terms of years, or is your recollection——

A. I wouldn't commit myself on that.

Q. Mr. De Toto, after July 1st, 1936, did you continue [fol. 800] operating moving picture theatres?

A. Yes, I did.

Q. And where?

A. In Syracuse, New York, I managed a theatre.

Q. For how long?

A. Two years.

Q. Which Theatre was that?

A. The Avon Theatre.

Q. After that period of time, where, if any place, did you operate a theatre?

A. Clifton Spring, New York.

Q. During what period was that?

A. Part of 1938-'39 and '40.

Q. I call your attention to the time in which you operated the Seneca Theatre, will you please state whether the Strand Theatre, after the Schine defendants took it over, practiced any bank night or other practices or other give-aways?

A. They did.

Mr. Rogers: May it please the Court. I object to that as incompetent and immaterial.

The Court: Received.

Mr. Rogers: I also object to it on the ground it relates to purely local transactions.

The Court: I will receive it.

[fol. 801] Q. Do you know whether or not there was a change in the procedure at the Strand Theatre after Schines took it over with respect to bank nights?

Mr. Rogers: May it please the Court, there is no testimony before the Court that there was any procedure prior to that time as yet, and before he can testify to a change, there must be some evidence that there was some prior procedure or prior practice.

Q. Did the Bernsteins resort to any bank nights, or other give-away or prizes during the time that it operated the Strand, and while you were connected with the Seneca Theatre?

A. No, they did not.

Q. You say that the Schines did resort to such give-away practices, bank nights, prizes?

A. They did.

Q. Do you know whether that practice continued after your Seneca Theatre closed on June 30th, 1936?

A. That I don't know.

Q. Was this practice continued by the Strand Theatre, or did it cease?

Mr. Rogers: The witness testified he doesn't know.

The Witness: That I don't know.

Q. You don't know. Now, Mr. De Toto, calling your atten——

* * * * * * *

[fol. 802] Canandaigua, New York, will you please state the population in 1938?

A. Between seven and eight thousand.

Q. Did you have any discussion in April, 1938, with anybody in Canandaigua with reference to the construction of a moving picture theatre?

A. Yes, I did.

Q. And when and with whom?

A. In the early part of April, 1938, a Mr. Marks.

Q. How many theatres were there in Canandaigua at that time?

A. One.

Q. Do you know who owned or operated that theatre?

A. It was operated by Schine Theatres.

Mr. Kallis: Will you mark that, please, for identification?

(Thereupon a paper referred to, was marked as Plaintiff's Exhibit P-53 for identification.)

Q. Showing you Plaintiff's Exhibit P-53 for identification, I ask you whether you have seen the contents of that in any printed newspaper?

A. Yes, I did.

Q. Do you have a copy of the newspaper?

A. No, I don't.

[fol. 803] Q. Did you try to obtain a copy?

A. I did.

Q. When? The last time?

A. Yesterday.

Q. Where?

A. Canandaigua, New York.

Q. What did you do with reference to the contents of that newspaper item?

A. I copied the heading and copied it in part.
Q. Is this the part that you copied?
A. It is.

Mr. Kallis: I am making the same offer in regards to this, your Honor.

Mr. Rogers: May it please the Court, I object to it on the ground this is now unique in that it is hearsay on hearsay, furthermore, it is incompetent and not binding on the defendants.

The Court: Sustained.

Mr. Kallis:

Q. At the time you were discussing the construction of the theatre with Mr. Marks in Canandaigua, New York, did you hear any discussion concerning the construction of a second theatre in Canandaigua by the Schine defendants?

Mr. Rogers: I object to that as hearsay, not binding on the defendants.

[fol. 804] The Court: It calls for a conclusion. It depends on whom the talk was with and the conversation is incompetent. Street talk between individuals wouldn't be competent.

Q. Did you go through with your plans to construct this theatre with Mr. Marks in Canandaigua?
A. No.
Q. Do you know whether the Schines ever built a second theatre in Canandaigua?
A. They did.
Q. When?
A. That I don't know the exact date.
Q. Was it in 1938?
A. No, it was later, much later than that.
Q. To the best of your recollection, when was it?
A. I couldn't commit myself. I don't know.
Q. Mr. DeToto, are you acquainted with a man by the name of Louis Di Pillo?
A. I am.
Q. And calling your attention to the year 1939, did you have any dealings with Mr. Di Pillo with reference to any theatre in Geneva, New York?
A. I did.
Q. What was your connection with Mr. Di Pillo?

A. Mr. Di Pillo came to me in the early spring, I would [fol. 805] say around in April. He said he planned on converting an apartment——

Mr. Rogers: One moment. I object to conversations between this witness and Mr. Di Pillo, on the ground that it is not binding on this defendant, and on the ground it is hearsay.

The Court: I will let him state what he did, if anything.

Mr. Kallis: That is right. I was just going to try to shorten it myself.

Q. Mr. Di Pillo did open and operate the Park Theatre in Geneva, New York?

A. He did.

Q. Did you have any connection with buying film product for him?

A. I did.

Q. Will you please state to the Court just what you did in connection with buying film product for Mr. Di Pillo's Park Theatre in Geneva, New York?

A. Mr. Di Pillo and I went to Buffalo some time in August.

Q. Of what year?

A. 1939.

Q. And at that time, as I understood your testimony, you were then managing the theatre at Clifton Springs, New York?

A. That is right.

[fol. 806] Q. And were you buying the film product for the theatre in Clifton Springs at that time?

A. I was.

Q. Now you say you came to Buffalo with Mr. Di Pillo and when was that?

A. Some time in August, 1939.

Q. And where did you go, Mr. De Toto?

A. The first office we stopped in was United Artists.

Q. And where was that in Buffalo?

A. 505 Pearl Street.

Q. Whom did you see there?

A. The manager, Mr. Sidney Lehman.

Q. Had you know- Mr. Lehman before?

A. I had.

Q. For how long?

A. Several years.

Q. How many years to the best of your judgment?

A. About two.

Q. What had been your dealings with Mr. Lehman?

A. I had brought pictures from him for Clifton Springs. I had luncheon with him at the "Old Spain."

Q. That is referring to a restaurant and not a country, is that right?

A. That is right.

Mr. Rogers: Or a theatre.

[fol. 807] Q. What had been your previous dealings with Mr. Lehman?

A. I had bought pictures from him.

Q. For what theatre?

A. For the Palace Theatre in Clifton Springs.

Q. Please tell us what the conversation was when you were in Mr. Lehman's office at United Artists, 505 Pearl Street, Buffalo, New York?

Mr. Rogers: I object to that on the ground it is not binding on the defendants, on the ground that no proper foundation has been laid, or proof of authority of Mr. Lehman.

The Court: Do you know of him selling to other theatre people?

The Witness: Yes, sir.

The Court: How frequently have you dealt with him?

The Witness: Your Honor, I used to see Sidney on the average of once a month. I used to come to Buffalo. I used to come to Buffalo and book pictures for the Palace Theatre.

By the Court:

Q. Through him, you mean?

A. Through his booker, but he was occasionally in the office, and I would stop and chat with him.

Q. Do you know what his position is?

A. He was office manager in charge of the United Artists [fol. 808] pictures for the Buffalo district.

The Court: Overruled.

Q. Please tell the conversation you had with Mr. Lehman on that occasion.

A. Mr. Di Pillo started the conversation.

Q. What did he say?

A. He asked Mr. Lehman for a contract for his Park Theatre in Geneva, New York for current second-run pictures.

Q. What, if anything, did Mr. Lehman say?

A. Mr. Lehman said that Schine had reserved second run for Geneva, current second run.

Q. Did you talk with anybody else connected with any distributor?

A. You mean other film companies?

Q. Yes.

A. I did.

The Court: You mean on that occasion at that time?

The Witness: Yes, sir.

Q. I might ask you if there was any other conversation?

A. There was, with Sidney Lehman?

Q. Yes. Please tell us what it was.

A. I said, "Sid, what do you mean Schine has second-run reserved for Geneva? Schine has no second-run policy in Geneva." There is one exception, Schine did run a few pictures he brought back some hit, but at that time there [fol. 809] was no current second-run policy in Geneva, but it was 30 or 60 days after the current pictures.

Mr. Rogers: I object to that on the ground it was not purported to be part of the conversation.

The Court: It may go out. Just state the conversation. You stated to Lehman about current second-run. What did he say in reply?

The Witness: I told him that there had been no second-run policy set in Geneva. Sid Lehman said that Schine had now saw fit to reopen the Temple and had reserved second-run for Geneva. There were no second-run available at that time.

Q. He told you that?

A. That is right.

Q. Did any other conversation take place on that occasion?

A. No, not with Sid Lehman.

Q. Will you please tell the Court, Mr. De Toto, what theatres Schine owned in Geneva at that time?

A. Three theatres, the Temple, Regent and Geneva.

Q. Were they all being operated every day?

A. No.

Q. Which, if any, were closed?

A. The Temple was closed permanently. The Regent did close occasionally in the summertime and operated week-ends.

[fol. 810] Q. And the Geneva?

A. Operated continuously.

Q. How long, to your knowledge had the Temple been continuously closed?

A. Since 1931.

Q. Do you know whether it has ever opened since 1931?

A. Yes, it has.

Q. When?

A. I believe it was some time in '32. I am not certain of that date.

Q. But since that time has it been opened?

A. Since what time?

Q. 1932.

A. I mean 1942.

Q. '42?

A. I meant '42.

Q. Closed continuously from 1931 to 1942, is that right?

A. That is right.

Q. Where else, if any place, did you go to on the same day that you stopped at the office of the United Artists?

A. Paramount Pictures.

Q. Where is that?

A. 464 Franklin Street, Buffalo, New York.

Q. Whom did you see there?

A. I saw the booker, Bill Rosenow.

[fol. 811] Q. How long have you known him?

A. I had known him for about 2 years.

Q. Had you had prior business with him?

A. I had.

Q. In what connection?

A. I used to book pictures with him.

Q. For what theatre?

A. Clifton Springs, Palace Theatre.

Q. What was the conversation?

Mr. Rogers: One moment. May it please the Court, I object on the ground it is not binding. I object on the ground that clearly there is no evidence as to what Mr. Rosenow's duties as a booker were, or what the duty as a booker is.

The Court: Let me ask you one question. Something was said yesterday about some interrogatories in reference to the managers in these various theatres. What was that? Interrogation in reference to employees of these theatres?

Mr. Kallis: You mean the distributors?

Mr. Wright: The distributors, we incorporated——

The Court: Did that refer to Schine?

Mr. Wright: Schine's interrogatories did not cover the positions of the distributors' representatives. Those were [fol. 812] covered in the answers of the distributors. We have again incorporated also the distributors represented about which there will be testimony. We just incorporated it in a stipulation which they have not yet signed and we again incorporated it in a notice to admit facts, which we served on them today. I am quite sure before the trial is over that there can't be any dispute——

The Court: I had in mind that you perhaps already in your interrogatories developed the matter of the employment of these individuals. We spent a lot of time unnecessarily in trying to qualify them.

Mr. Wright: We did qualify the distributors in a stipulation, but counsel has not agreed to admit those interrogatories, the answers, so, we have again been compelled to serve notice to admit for the same facts, and certainly that will be admitted before we finish. Certainly there can't be any dispute about what their jobs were at the time the distributors employed them.

The Court: I will receive the evidence. One question. [fol. 813] Might inquire further about his relations with Rosenow.

Mr. Wright: If the Court please, I can assure you we will show the position of those people at the time of the conversation, and I do think——

The Court: All right.

Mr. Rogers: On the other hand, I can assure your Honor, that they cannot truthfully claim, truthfully, I say, claim that a mere booker who books mere pictures and after the pictures are sold, all a booker is is one who books in sales and I venture to say they will never be able to prove any booker has any authority to make sales or discuss sales.

The Court: Objection overruled. What was the conversation with Mr. Rosenow?

The Witness: The office manager was out at the time.

By Mr. Kallis:

Q. What did you say to him?

A. I talked to him in regard to securing second-run for the Park Theatre in Geneva.

Q. What did he say to you?

A. He said he would send his salesman, Mr. Myers, who had that territory and I would talk to him, try to work out a deal with him; he would send him to the Palace Theatre [fol. 814] in Clifton Springs. That is all he said.

Mr. Rogers: That being the case, I move to strike it.

The Court: Overruled.

Q. Did you know Mr. Myers?

A. Yes, I did.

Q. What was his first name?

A. I believe it was Fred. I am not certain.

Q. Had he ever called upon you at the Theatre in Clifton Springs?

A. He had.

Q. How many times?

A. Several times, five or six.

Q. What was the subject of your discussions with him?

A. I bought pictures from him for the Palace Theatre in Clifton Springs.

Q. How many times did you talk with him?

A. Five or six times.

Q. Did you see Mr. Myers after you had this talk with Mr. Rosenow?

A. I did.

Q. What did Mr. Meyers tell you at the Palace Theatre in Clifton Springs?

Mr. Rogers: Same objection.

The Court: You saw Mr. Myers after you had been to Buffalo?

[fol. 815] The Witness: That is right.

By Mr. Kallis:

Q. When was that?

A. I don't recall. It was some time after that.

Q. What did he say?

Mr. Rogers: Same objection.

The Court: Objection overruled. What did he say?

The Witness: He said he could not sell me current second-run Paramount pictures, but that he had other old pictures and some first-run rejects, pictures that Schine had rejected, that I could have.

The Court: You are speaking now about Clifton Springs?

The Witness: Mr. Myers came to Clifton Springs, and I was managing the Theatre at that time.

The Court: That is the only theatre there?

The Witness: Yes. Clifton Springs is only about 12 miles from Geneva.

Mr. Kallis: I understand, your Honor, his testimony to be he was managing Clifton Springs, but buying for the Park in Geneva.

The Court: All right.

Mr. Rogers: By the way, Mr. Kallis, will you please fix the date of this talk with Mr. Myers?

The Court: He said this was in August.

[fol. 816] Mr. Rogers: That was United Artists talk, your Honor. He claims that was with United Artists and later Paramount. Then he said he saw the booker, and the booker told him to see Myers.

The Court: He saw this other man Myers at Clifton Springs?

The Witness: Either August or September, 1939.

Mr. Kallis: Will you mark this for identification?

(Thereupon a newspaper, referred to was marked as Plaintiff's Exhibit P-54 for identification.)

Q. Sergeant De Toto, I show you Plaintiff's Exhibit P-54, purporting to be page 9 of the Geneva Daily Times for Monday, May 15th, 1939, and ask you where you obtained that?

A. I obtained this copy from the office of the Geneva Daily Times in Geneva, New York.

Q. When was that, as nearly as you can recall?

A. It was some time in August, 1939.

Q. What was the admission price of Schine's Regent Theatre in Geneva, New York, prior to the time that Mr. Di Pillo opened this Park Theatre?

A. 10 cents for children and 25 cents for adults.

Q. And after Mr. Di Pillo opened the Park Theatre, do you know whether Schine's Regent changed its admission price?

A. It did. It changed the adult admission from 25 cents [fol. 817] to 20 cents.

Q. How long did Mr. De Pillo operate the Park Theatre?

A. About three or four months.

Q. And you know of what its physical condition was at the end of that time. I will withdraw that. He closed the Park after three or four months?

A. That is right.

Q. Do you know whether or not there was a change in admission price of Schine's Regent after Mr. Di Pillo closed his Park?

A. Yes, there was.

Q. What was the change?

A. From 20 cents it went to 30 cents.

Q. And did it remain at that price, or did it change?

A. Well, it is 40 cents today, that includes tax.

Q. Calling your attention, Mr. De Toto, to the time or period during which you were operating the theatre at Clifton Springs, did you have any difficulty at all in buying film product?

Mr. Rogers: One moment. I object to that. There is no evidence that Schines in any manner competed with him at Clifton Springs.

The Court: What did he say?

Mr. Kallis: It is a preliminary question.

Q. You made applications for films for your theatre at [fol. 818] Clifton Spring, New York?

A. That is right.

Q. Were all of your applications for film fulfilled?

Mr. Rogers: One moment. I object to that as immaterial. We are not dealing with Clifton Springs at all here.

Mr. Kallis: I am offering to show by this witness that in Clifton Springs, where Schine did not operate a theatre and was, therefore, of no competition or opposition to Mr. De Toto, Mr. De Toto had absolutely no difficulty in buying film, but during the same period with regard to Geneva——

Mr. Rogers: As a matter of fact, Mr. Kallis, you failed to state to his Honor that he had the only theatre in the town. They could either sell to him or not sell at all.

The Court: Sustained.

Q. Mr. De Toto, can you state whether or not there is a custom in the film industry with respect to distributors taking the initiative in offering films to exhibitors?

Mr. Rogers: One moment.

The Court: Read the question.

(Last question read.)

Mr. Rogers: This witness is incompetent to testify as to [fol. 819] a general custom of distributors nationwide. He has not shown he has had any experience nationwide, and has never been in the distribution business.

Mr. Kallis: I will withdraw the question, if the Court please.

The Court: It shows they sent their representatives from place to place.

Mr. Kallis: That is exactly what I had in mind.

The Court: To show what they do frequently, sending their representatives out to places, if that be the fact.

Q. The Court has ruled you can answer that.

The Court: As far as his knowledge is concerned.

Q. Confine your answer to Syracuse, Clifton Springs.

A. I didn't buy film in Syracuse.

Q. You did not buy any?

A. Did not.

Q. Confine your answer then to Seneca Falls, Clifton Springs, Geneva, Mt. Morris, New York.

Mr. Rogers: We have no testimony about him buying any film in Mt. Morris, New York.

Mr. Kallis: I will lay the foundation as soon as he answers.

Q. Did you have any experience in operating the theatre [fol. 820] in Mt. Morris, New York?

A. Yes, I did.

Q. When?

A. 1940 and '41.

[fol. 821] Q. What theatre?

A. The Genesee Theatre.

Q. That was up to the time that you joined the Army?

A. That is right.

Q. Now, what is the custom with reference to salesmen being sent out by the distributors to those towns which I have mentioned?

Mr. Rogers: I object to that, may it please the Court. This is asking for a custom of the distributors. This man has not testified that he has had any experience as a distributor.

Mr. Kallis: He does not have to have any experience.

The Court: I suppose the agents of the distributors came to him to sell pictures in these various places.

Mr. Kallis: Yes.

The Court: He can testify to that.

A. Yes, these companies had salesmen and they always came to see me in regard to the sale of their products.

Q. Were there any exceptions to that that you observed?

A. The only time they didn't come around was when there was competition and they didn't care to sell to me.

Mr. Rogers: I move to strike that out as a conclusion of the witness.

The Court: Strike it out.

Mr. Kallis: This may be repetition, if the Court please, [fol. 822] and if it is I respectfully request that you pardon me, because I am not sure that we got some of this testimony in the record.

By Mr. Kallis:

Q. Very briefly, Mr. DeToto, what was the admission price of the Seneca Theatre while you were operating the theatre?

A. Ten and twenty-five cents.

Q. What was the admission price of the Strand Theatre during that first period?

A. Was the first question yours?

Q. Yes, yours.

A. Mine was ten and fifteen cents.

Q. What was the Strand?

A. Ten and twenty-five cents.

Q. After the Seneca closed down what was the admission price of the Strand in Seneca Falls, N. Y.?

A. The admission price shortly thereafter was 10, 25 and 35 cents.

Q. I gather, then, that there was an increase in the admission price in the Strand shortly after you closed the Seneca; is that right?

A. Shortly after they closed the Seneca. There was.

Q. And the Seneca never was operated after you vacated the premises, was it?

A. No, but you said "I closed". They closed.

[fol. 823] Q. I mean after your lease expired.

A. That is right.

Q. You say there was an increase of the admission price of the Strand Theatre from what to what?

A. To 35.

The Court: 10, 25 and 35?

The Witness: That is right.

Q. The 25 cents as charged was not on the admission price at all?

A. It was in the balcony. Downstairs was 35.

Q. It was increased from 25 to 35 cents for the main floor?

A. That is right.

Q. Do you know whether it had ever been more than 25 cents during your familiarity with the theatre?

A. No, it was not.

Mr. Kallis: That is all.

(Witness excused temporarily.)

[fol. 824] ARTHUR J. BUCK, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Wright: Mark this for identification.

(Thereupon the distribution agreement covering Colonial Theatre, Fostoria, Ohio, was marked as Plaintiff's Exhibit P-55 for identification.)

Mr. McKay: Mr. Buck's deposition was taken in this case, and if Mr. Wright goes beyond the mere identification of documents we want to use the deposition.

Mr. Wright: Mr. Wright is not going to go beyond the mere identification of the documents.

Mr. McKay: Then you won't object to our reading from the deposition of Mr. Buck?

Mr. Wright: I may or may not object to your reading from the deposition at any time. Mr. Buck I regard as your witness.

Mr. McKay: Your Honor, we are very anxious to cooperate in getting Mr. Buck away from here. The deposi-

tion was taken by the plaintiff. All I say is that if we desire to read from this deposition after Mr. Buck has been excused [fol. 825] there should not be any objection raised on the ground that he was here in court.

The Court: Why are you not entitled to read it?

Mr. McKay: Mr. Wright may raise the objection that he was here in court and we did have the opportunity to examine him and didn't.

The Court: I do not think he is in position to raise that question. He is calling him now.

Mr. Wright: Mark these papers for identification.

(Thereupon the letter, July 23, 1936, referred to was marked as Plaintiff's Exhibit P56 for identification.)

(Thereupon the letter, July 28, 1937, referred to was marked as Plaintiff's Exhibit P-57 for identification.)

(Thereupon the letter, April 4, 1936, referred to was marked as People's Exhibit P-58 for identification.)

(Thereupon the letter, August 3, 1937, referred to was marked as Plaintiff's Exhibit P-59 for identification.)

Direct examination.

By Mr. Wright:

Q. Mr. Buck, I show you this exhibit here that is marked as P-55 for identification and ask you if you can identify the signatures on the last page?

[fol. 826] A. Yes, sir.

Q. A. J. Buck is your signature, is that right?

A. That is right.

Q. Ural Buck, is that the signature of your brother?

A. That is right.

Q. I show you this Exhibit P-56, a photostatic copy of a letter dated July 23rd, and ask you if you recognize that as a copy of a letter that you wrote with your signature on it?

A. Yes.

Q. And this Exhibit P-57, I ask you if you recognize the signature there as yours and whether you wrote that on or about the date it bears?

A. That is right.

Mr. Wright: That is all.

By Mr. McKay:

Q. Mr. Buck, this William Rogers to whom this letter P-58 is addressed is an officer and general salesmanager of Loew's, Inc., or sometimes designated as Metro-Goldwyn-Mayer?

A. That is right.

Q. He has nothing to do at all with Warner Bros.?

A. No, sir.

Q. Or Vitagraph?

A. No, sir.

[fol. 827] Q. Or 20th Century-Fox?

A. No, sir.

Mr. Wright: There isn't any question about that.

Mr. McKay: I am trying to get rid of the man quickly and I don't want this question to come up in the future. If you will leave me alone I will expedite things for you.

Q. He had nothing to do with any company except Metro?

A. And he wrote me to that effect that he couldn't do anything about——

Mr. Wright: Just a moment. Your Honor, that is not responsive.

Q. That situation was so as of the date of this letter, which is April 4, 1936? I mean what you just testified to also applied at the time this letter was written?

A. That is right.

Q. And you knew that to be the situation when you wrote the letter?

A. That he had nothing to do with it?

Q. Yes.

A. Certainly I did.

Q. And you were only writing it to him as a personal friend?

A. That is right.

Mr. McKay: That is all.

[fol. 828] URAL H. BUCK, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. You live in Fostoria, Mr. Buck?
A. That is right.
Q. You are the manager of the Civic Theatre there?
A. That is right.
Q. I show you this letter marked Exhibit P-59 for identification and ask you if that is your signature on it?
A. I wrote it and signed it.
Q. You wrote it on or about the date that it bears?
A. That is right.

Mr. Wright: That is all.

By Mr. McKay:

Q. I just want to ask Mr. Buck one question. Mr. Buck, your deposition was taken in this case in Cleveland some time ago, wasn't it?
A. That is correct.

Mr. Wright: That is objected to as not proper cross examination.

Mr. McKay: I am not cross-examining him. I am just laying the foundation for reading the deposition in case [fol. 829] I have to do it, and it was done at the request of the plaintiff.

The Court: All right.

Mr. McKay: Will you stipulate that Mr. Arthur Buck would make the same answer, so that I do not have to call him back on the stand?

Mr. Wright: Yes, I assume he would.

The Court: It already appears, I think.

Mr. Wright: Mark this for identification.

(Thereupon the option agreement referred to was marked as Plaintiff's Exhibit P-60 for identification.)

GEORGE K. ANGELAS, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Mr. Angelas, what is your occupation?
A. I am a restauranteur.
Q. Whereabouts?
A. Mansfield, Ohio.
Q. That is where you live?
A. That is right.
[fol. 830] Q. How long have you been in that business?
A. Since 1931.
Q. In 1938 did you buy any property at Norwalk, Ohio?
A. I did.
Q. For what purpose?
A. For the purpose——

Mr. Rogers: One moment. I object to that on the ground that that is not binding and it calls for a conclusion.

The Court: What property did you buy?

The Witness: I bought the property at the corner of East Main and Prospect Streets in Norwalk, Ohio.

Q. I will show you this option agreement that has been marked as Plaintiff's Exhibit 60 for identification and ask you if that property you bought is the property that is described in that agreement?
A. Yes, sir.
Q. How much did you pay for it?
A. $19,000.
Q. And Exhibit 60 that I have shown you that is your signature on there?
A. Yes, sir.
Q. Is that a copy of the option that you delivered to anyone from the Schine Company on that date?
A. That is right, the Schine Circuit, Inc.
[fol. 831] Q. Who did you negotiate that agreement, Exhibit 60, with?
A. A man by the name of Mr. Bud Silverman.
Q. When did he first come to see you?
A. In the first week of January, 1939.
Q. Where was that?

A. At my office at Mansfield, Ohio.

Q. What did he say to you then?

Mr. Rogers: One moment. I raised the question previously and we still have not had Mr. Bud Silverman's authority to bind the defendants established, and I object to it on the ground that no proper foundation has been laid to show the authority of Mr. Silverman.

The Court: I will receive it subject to its being connected.

Mr. Rogers: I also object to it on the ground that it relates to a purely local transaction.

The Court: There is some testimony here with reference to Silverman's employment. Objection overruled, subject to its being connected up.

(Last question read.)

A. Mr. Silverman came in my office and asked me if I did buy the property at Norwalk and said that he saw it in the local paper. I told him yes, and he asked me what I intended to do with it. I told him I was intending to build a building [fol. 832] for a theatre and a restaurant. Then he asked me if I was intending to operate the theatre personally or lease it out. I told the gentleman at the time that I was undecided. Then he spoke very nicely about the Schine Circuit, Inc., and he said that a deal could be closed with the Schine Circuit, Inc., to the best of my benefit, and if I would not close the deal with the Schine Circuit, Inc., I would be broke in a year after I started.

The Court: What?

The Witness: That they will break me in a year after I start. And I asked the reason and he said that they controlled the first and second class pictures in that town and they had them tied up for two years in advance. I told Mr. Silverman that I was not the type to be scared right out of the deal, but I will think it over. Then I suggested that he should come with me up to my attorney's office to meet my attorney, Mr. C. H. Henkel of Mansfield.

The Court: What did you do then?

The Witness: We went up to the attorney's office and he did get acquainted. They talked the thing over and they set a meeting for the second or third day afterwards when Mr. Silverman came into his office, and Mr. Silverman and [fol. 833] Mr. Henkel and I were at the meeting. At that meeting Mr. Silverman suggested about George Angelas

building the building and leasing it to the Schine Circuit, Inc., for a period of twenty years, based on a ten per cent income on my investment. At that particular meeting Mr. Silverman made a remark in front of my attorney of a certain deal that was in a neighborhood town, a town by the name of Medina, Ohio, where an individual operator was operating a theatre and he refused to cooperate with the Schine Circuit, Inc., and in a year's time he was broke and he went and begged the Schine Circuit, Inc., to take the theatre over.

Q. Then did you have any further conversations?

A. Later on Mr. Silverman called Mr. Lazar in. Mr. Lazar was supposed to be——

Mr. Rogers: One moment. Let us get the date.

Q. Was that before or after you gave this option agreement to Schine that has been identified as P-60? Look at the date on that.

The Court: Was it before or after that date Lazar came there?

The Witness: Mr. Lazar was in the picture before this date. As I recall, he was getting ready to go to Florida [fol. 834] on his vacation and that is when this option was taking place, in order to safeguard his vacation to Florida.

Q. What do you mean by that?

A. He was leaving and he wanted to finish this thing while he was on his vacation.

Q. The option agreement there was negotiated with Mr. Silverman and Mr. Lazar?

A. And Mr. Lazar.

Q. Then did Schine ever exercise the option?

A. No, sir.

Q. And you still have the property there?

A. Yes, sir.

Q. You have never built a theatre or restaurant on that?

A. Never built anything.

Q. Why not?

Mr. Rogers: One moment. I object to that as immaterial.

The Court: Overruled.

Q. You may answer.

A. Soon after the negotiations with the Schine Circuit, Inc., ended the Schine Circuit, Inc., purchased the property,

two lots east of my property, and built their own new building.

Q. A theatre?

A. A theatre. And I, of course, was unable to compete [fol. 835] with them then or put up a new building.

Mr. Wright: That is all.

Mr. Rogers: I move to strike the last part of that answer out.

The Court: That he was unable to compete? Was that the answer?

Mr. Rogers: Yes. He had no theatre. He had nothing.

Mr. Wright: Nothing but a $19,000 investment.

The Court: That part may be stricken out. I will let it stand that he never built.

Cross-examination.

By Mr. Rogers:

Q. When did you actually take title to that piece of real estate?

A. The contract was signed on December 27, 1938, and the deed was given to me on March 1, 1939.

Q. Between the time the contract was given to you and the deed was signed did you ever draw any plans to build a theatre on that site?

A. Mr. Lazar was good enough to present me with a set of plans that he had obtained——

Q. Will you answer my question: Did you ever draw a set of plans to put a theatre on that site?

A. I did not.

Q. Did you ever employ an architect to draw a set of plans?

[fol. 836] A. Mr. Silverman stopped me from doing that.

Mr. Rogers: I move to strike that.

The Court: Strike it out.

Q. Did you ever employ an architect to draw any plans on that site?

A. How could I employ one?

Q. Please answer my question.

A. I didn't.

Q. You did not?

A. No, sir.

Q. Then all you had was an idea in your mind that you would like to build a theatre on that site if you could get somebody to build it for you?

A. I had the money to build it.

Q. Did you want to build it yourself and operate it yourself?

A. No, sir.

Q. But you never did build it for yourself, did you?

A. No.

Q. And you had plenty of money to build it with, didn't you?

A. That is right.

Q. As a matter of fact, when Mr. Silverman called on you wasn't he the one that suggested about a theatre being built on that site?

A. No, sir.

[fol. 837] Q. Is it your testimony that you told Mr. Silverman the first time he called on you that you proposed to build a theatre on that site?

A. He asked me the question, sir.

Q. He asked you the question?

A. That is right.

Q. As to whether or not you intended to build a theatre on that site?

A. That is right.

Q. And you said yes?

A. Yes.

Q. Wasn't it just the other way around, didn't you tell him you had that site and you proposed to build a restaurant on that property and a business building and he asked you wouldn't it be a good idea for you to put a theatre in there and if you did he would be happy to see if he could not make a deal with you?

A. No, sir.

Q. You say he did not say that?

A. He did not.

Q. Do you recall going to a Mr. Upham?

A. I do.

Q. An architect?

A. No, sir.

Q. Mr. Upham was a builder and a financier, wasn't he?

[fol. 838] A. That is right.

Q. Where was Mr. Upham?

A. At Mt. Vernon, Ohio.

Q. And you were suggested to go to see Mr. Upham by Mr. Silverman, weren't you?

A. That is right. Mr. Silverman—may I correct that?

Q. Or was it Mr. Lazar?

A. Mr. Silverman and Mr. Lazar both.

Q. They both suggested you go to see Mr. Upham?

A. Yes, sir.

Q. Did they suggest as to why you were to see him or what you were to see him for?

A. Yes, to see what kind of people the Schine Circuit, Inc., were and how good they were.

Q. Is that all?

A. Yes, sir.

Q. Didn't you go to Mr. Upham and discuss with Mr. Upham about obtaining finances to build this theatre in Norwalk?

A. No, sir.

Q. Did you have any talk with Mr. Upham about him assisting you to finance a theatre building in Norwalk on the site on which you had that option?

A. Not that I recall.

Q. Not that you recall?

A. Yes.

[fol. 839] Q. Will you say you didn't have any talk with Mr. Upham about Mr. Upham furnishing you financing or assisting you in obtaining financing to build that theatre in Norwalk?

A. Repeat the question.

Q. (Question read.)

A. I did not ask Mr. Upham for any finance help.

[fol. 840] Q. Did you ever discuss with Mr. Upham the question of financing in connection with the Norwalk Theatre?

A. No.

Q. Never had any talk with him on that subject before?

A. Never but once.

Q. I am asking you whether you ever had a talk with Mr. Upham with relation to financing in connection with this proposed theatre in Norwalk?

A. No, sir.

Q. Do you remember having a talk with Mr. Upham at that time?

Mr. Wright: What time is this?

Mr. Rogers: The time of the making of this option, or shortly thereafter, about Mr. Upham being willing to buy the land and building the theatre and restaurant for you?

The Witness: I don't recall, sir.

Q. Do you ever recall discussing with Mr. Upham a proposal under which he was to buy that land from you, and he was to build a theatre on that land and a restaurant on that land?

A. If I recall right, I think there was a suggestion Mr. Silverman that I should raise the question, but I wasn't interested in financial help.

Q. What I am asking you, not what Mr. Silverman told [fol. 841] you, but didn't you have a talk with Mr. Upham, under which you made the suggestion to him he buy the land and build the theatre and restaurant for you on that land?

A. I never made such a suggestion, sir.

Q. One moment.

A. I never made such a suggestion.

Q. There was never any discussion to Mr. Upham about him buying land and putting up a theatre and restaurant on that property?

A. I believe it was the suggestion of Mr. Silverman.

The Court: Did you ever talk to Mr. Upham about his doing that? That is the question.

The Witness: I never asked Mr. Upham about building a building, or any help.

Mr. Rogers:

Q. You said there was a suggestion about Mr. Upham building a theatre and restaurant for you?

A. I believe Mr. Silverman made the remark if I need any help, Mr. Upham would be very happy to help me, either Mr. Silverman or Mr. Lazar.

Q. Wasn't it after you had a talk with Mr. Silverman or Mr. Lazar suggested if you required any financial help that Mr. Upham would be a good man for you to see?

The Witness: What is that?

Mr. Rogers: Will you read the question?

[fol. 842] (Last question read.)

The Court: They suggested, you mean, Mr. Rogers?

Mr. Rogers: Yes.

The Court: Did they suggest that to you, that Mr. Upham would be a good man for you to see?

The Witness: They suggested to see Mr. Upham, and see how the Schine Circuit, Incorporated were dealing with independent operators and builders.

The Court: That does not answer the question.

Mr. Rogers: That does not answer the question.

Q. There was something said to you, wasn't there, either by Mr. Silverman, or Mr. Lazar, to the effect that Mr. Upham would be a good man for you to see if you required any financing, didn't they? Didn't they say that to you?

A. Not if I require any financial—they asked me to see Mr. Upham only to get acquainted and learn who the Schine Circuit, Incorporated are.

Q. Wasn't there some talk between you and Mr. Silverman, or you and Mr. Lazar under which the question of financing through Mr. Upham was discussed?

A. Seems to — Mr. Lazar or Mr. Silverman recommended Mr. Upham for any finance, I ever need, and also made the recommendation that if I want to sell the property to Mr. Upham, or if I did not, to borrow the money from Mr. [fol. 843] Upham and build the building there.

Q. That was the talk you had?

A. That is right. That was their suggestion.

Q. Wasn't it after that talk you went to see Mr. Upham?

A. It was.

Q. And where did you see Mr. Upham?

A. At his office at Mt. Vernon, Ohio.

Q. And in the course of your talk with Mr. Upham, in Mt. Vernon, Ohio, was the question of financing discussed at all?

A. No, sir, my attorney, Mr. Henkel and I——

Q. No, I just asked you was the question discussed?

A. All right.

Q. Was the question of financing discussed with Mr. Upham when you saw him in Mt. Vernon at that time?

The Court: He has already answered before the same question.

Mr. Rogers: But before that he said there never was any

talk about it before. Now he admitted there was some talk about it.

Q. Will you kindly answer that question?

A. Will you repeat the question, please?

(Question read.)

A. Financing what?

The Court: Financing your project there, your theatre [fol. 844] project?

The Witness: No, sir.

Mr. Wright: I am just wondering what the purpose of the cross-examination is now.

The Court: He is finished now. He will go on to something else.

Mr. Wright: The whole thing is whether they did go through with it, or they didn't.

Mr. Rogers:

Q. After the option that you just looked at and Mr. Wright showed to you, didn't you try to sell this property to the Schines?

A. No, sir.

Q. I show you this paper and I ask you, did you ever see that paper before?

The Court: Did you ever see that before? That is the question?

The Witness: I have, yes. May I say something?

The Court: Just answer the question.

Q. And didn't you see this paper some time in the month of May, 1939?

A. I don't recall the dates, some time in May.

Q. That is right, isn't it, some time in May, 1939?

A. That is right.

Q. Do you remember by whom this paper was prepared? [fol. 845] A. By Mr. Henkel, I believe.

Q. Who is Mr. Henkel?

A. An attorney.

Q. Is he your attorney?

A. Yes, sir.

Q. So this was prepared by your attorney, wasn't it?

A. That is right.

Q. I show you this signature, George K. Angelas, is that your signature?

A. Yes, sir.

The Court: Do you want this young man (referring to the Witness, Sergeant De Toto) further, Mr. Wright?

Mr. Wright: Not tonight, no. You can be excused for the day. Be back at 10 o'clock tomorrow for your cross-examination. Is that the right time, your Honor, 10 o'clock?

The Court: Yes.

Mr. Rogers: I offer this in evidence.

Mr. Wright: I wish to examine him on it first.

Q. Could you tell us, Mr. Angelas, the circumstances under which that agreement was prepared?

Mr. Rogers: One moment. May it please the Court, I object to that, this merely is not qualification. This is [fol. 846] going into the merits. Mr. Wright may on re-direct bring anything forward, but he cannot obstruct the introduction of this document in evidence. He can't go into the circumstances surrounding the deal.

Mr. Wright: It might be from its execution it isn't competent to prove anything. What is it supposed to prove? May I ask that?

Mr. Rogers: I will bring that out.

The Court: The Court is entitled to know what bearing it has.

Mr. Rogers: The bearing that it has, may it please the Court, is that under that deal that he proposed to us, he was to take part of that and reserve it to himself, sell the balance and we, at our cost, were to put the theatre on there, not its cost there. We were going to build the theatre at our own cost.

The Court: That is in this exhibit, this paper to which you now refer.

Mr. Rogers: Yes, sir.

The Court: The option was prior to that?

Mr. Rogers: The option was prior to that, the option was before he acquired the property. This is after he acquired the property and yet, when he came to make the deal with [fol. 847] us, he wanted us to build the theatre at our expense.

The Court: The option is to buy or sell it at certain terms and conditions, wasn't it?

Mr. Rogers: No, sir. You see, there were two transactions.

The Court: I understand that.

Mr. Rogers: Under the option he was to build a theatre for us.

The Court: All right. That is just what I am getting at.

Mr. Rogers: And he tried to make another deal to have us build a theatre.

The Court: That is what I had in mind.

Mr. Rogers: It may be I am brain weary at this hour.

The Court: I was trying to accommodate the witness.

Mr. Rogers: Yes, thank you. I would like to, too.

The Court: I will receive *at* at this time.

(The agreement, previously marked as Defendants' Exhibit D-25 for identification, was received in evidence.)

Mr. Rogers:

Q. When this agreement was executed by you, that is, Defendants' Exhibit D-25——

Mr. Wright: Is this an agreement? I didn't notice there [fol. 848] was any signature other than his own there.

Mr. Rogers: There is a signature on it. That is right.

Mr. Wright: Are you going to establish it is an agreement? It certainly isn't one on its face.

Mr. Rogers:

Q. After you signed this paper, Defendants' Exhibit D-25, you offered this paper to the Schine people, didn't you for their signature, isn't that so?

The Court: Do you know what was done with that paper?

The Witness: I believe this paper was forwarded to the Schine Theatres.

Mr. Rogers: That is right.

Q. You forwarded it to Schines for them to approve and sign, if they were prepared to make this deal, isn't that right?

A. I believe so.

Q. And under this deal, Defendants' Exhibit D-25, this contract here, if they accepted this, they were then supposed to build the theatre at their own expense?

The Court: The contract shows for itself. The agreement shows for itself.

Mr. Rogers: This is a contract of sale.

The Court: You just said that.

Mr. Rogers: I said the deal called for it.

Mr. Wright: There wasn't any deal made, as I under-
[fol. 849] stand it. I object to him calling it a deal. All he is referring to is a paper shown to Mr. Angelas.

Mr. Rogers: Exactly.

Q. If they accepted it, then Schine would be compelled to build a theatre at their own expense, isn't that right?

Mr. Wright: If the Court please, that is objectionable, and merely argumentative.

The Court: It shows what he offered to do. You don't make it any stronger by testifying to the fact as to what is in the paper, that appears in the paper.

Mr. Rogers: No, it does not. That is just the point.

The Court: The paper does not so state?

Mr. Rogers: No.

The Court: I thought you claimed this showed just that?

Mr. Rogers: No, this was just the first step. He offered to sell the property to Schine.

The Court: On condition that Schine build, you say?

Mr. Rogers: I wish to bring forth that under that deal Schine would have to build the theatre themselves.

The Court: Doesn't the paper say so?

Mr. Rogers: No, sir.

Q. But isn't that so?

[fol. 850] A. What is that?

Q. There was no agreement on your part to build a theatre if they took this property, to buy this land?

The Court: The paper shows for itself what was included and excluded, that is all.

The Witness: No agreement signed.

The Court: Let me see the paper.

(Mr. Rogers hands the exhibit D-25 to the Court.)

The Court: Is that all the cross-examination?

Mr. Rogers: Just a moment, sir. I just wish to know.

Q. After Defendants' Exhibit D-25 that contract was executed?

Mr. Wright: What is this one supposed to be, is that executed?

Mr. Rogers: It is a duplicate of it.

Mr. Wright: You mean executed by Mr. Angelas?

Mr. Rogers: Yes.

The Court: Simply a contract to sell the land, that is all this is.

Mr. Rogers: Yes.

Q. Didn't you have a talk with Mr. Lazar about this contract?

A. About selling the land, you mean?

Q. After this paper was signed by you and forwarded to Schine, didn't you have a talk with Mr. Lazar about this D-25?

[fol. 851] A. Yes, sir.

Q. And weren't you told by Mr. Lazar that in accordance with what you were reserving out for yourself, it would be impossible for them to build a theatre on this plot, with a decent lobby in it and that they wouldn't take it for that reason?

A. They never offered to buy the whole lot. This agreement only specifies part of the lot.

Q. You were to reserve part for your restaurant?

A. Yes, sir, that was his recommendation.

Q. And that was what you wanted, too, wasn't it?

A. Not exactly.

Q. Did you want that?

A. What?

Q. Didn't you want part of that reserved, the restaurant, yourself?

A. Yes, that is right.

Q. Annexed to this D-25 was this plan of the property?

A. Yes.

Q. You had that drawn yourself and prepared?

A. Yes.

Q. You attached it to this contract?

A. That is right.

Q. Didn't they tell you that by reason of the fact you were taking 30 feet out of the front on Main Street, and leaving [fol. 852] only 20 feet for a lobby to run 75 feet long, that that was the kind of a lobby they couldn't use for a theatre, and therefore, they wouldn't make the deal?

A. That is right.

Mr. Rogers: That is all.

The Court: Anything, Mr. Wright?

Redirect examination.

By Mr. Wright:

Q. Mr. Angelas, at whose suggestion did you have these agreements prepared?

A. Mr. Lazar.

Q. And then, as I understand, after they were sent to Mr. Lazar, they were never executed by the Schine Company, is that it?

A. Right.

Q. Is that where the negotiations broke off when they refused to execute those agreements that were submitted?

A. The negotiations at the beginning broke off when the Schine Circuit, Incorporated, refused to give us the security that would require on the building that they were supposed to build.

Q. When was that?

A. First come in and offered a 20-year lease and 10 per cent investment income.

[fol. 853] Mr. Rogers: Pardon me.

Mr. Wright:

Q. That was when Silverman——

Mr. Rogers: Pardon me. That had nothing to do with this contract D-25.

The Court: Ask your question. Do you object to it?

Mr. Rogers: He asked when it broke off in D-25. That has nothing to do with this D-25, Mr. Wright.

The Court: Will you read the question and answer?

(Last question and answer read, as follows: "Q. Is that where the negotiations broke off when they refused to execute those agreements that were submitted?

A. The negotiations at the beginning broke off when the Schine Circuit, Incorporated, refused—")

Mr. Rogers: I object to that.

The Court: Tell when the negotiations broke off.

The Witness: The last of the negotiations?

Mr. Rogers: Yes.

The Court: Is that what you want, Mr. Wright?

Mr. Wright: I want the complete — of that, all of the negotiations.

Mr. Rogers: Now, may it please the Court, Mr. Wright was going to expedite this. Now, he is going into this [fol. 854] whole story.

The Court: We have the option here.

Mr. Wright: As I understand it, there were prior negotiations in which he was to build a theatre himself, is that correct?

The Witness: Yes.

The Court: The option, he testified.

Mr. Rogers: It is in the option. You have the option in.

By Mr. Wright:

Q. Can you tell us why those negotiations based on your building the theatre ceased?

Mr. Rogers: I object to that as incompetent and immaterial.

The Court: Any conversations I will let him tell.

Mr. Wright: The last deal was the deal.

The Court: I know, but there may be some material matters intervening. Now, why wasn't the option executed?

Mr. Rogers: That is what he is talking about. I don't see there is any materiality to it.

The Court: Overruled.

The Witness: The option was not executed, because the Schine Circuit, Incorporated was supposed to pay 10 per cent on the cost of the investment on a 20-year lease.

Mr. Rogers: Is the witness testifying to what is in the [fol. 855] document or outside the document?

The Court: So far as he has gone, this is all in the paper.

The Witness: They offered to give the theatre building that they owned at that time as security against my lease to protect my lease, but they had a little clause on this agreement in the end of the six years they should have the right to withdraw the building from the security. Consequently at the end of the six years I would have no protection against my investment, other than the pictures they would have in the theatre. I refused it. From then on, Mr. Lazar and Mr. Silverman suggested part of the store and lot, as you see in the paper.

By Mr. Wright:

Q. That is that they build the theatre?

A. That is part of my land, so they can build their own theatre, then they came on and came in with a letter which you have in your files.

Mr. Rogers: One moment please.

The Witness: Whereby——

Mr. Rogers: Please, Mr. Angelas. I object to this witness testifying.

[fol. 856] Mr. Wright: Just one question I think will clear it up.

Q. Was there any time then in the negotiations that the suggestion that you suggested that they build the theatre instead of you, or was that suggestion made by Lazar and Silverman? That is all I wanted to get out.

A. That I was going to build the theatre, or that they were going to build the theatre?

Q. I say, who made the suggestion that they build the theatre after the negotiations for your building the theatre broke off?

A. They made the suggestion.

Mr. Wright: That is all.

The Court: Then you made this; you had this next paper drawn?

The Witness: And later on draw the papers which they wanted part of the land as I will not sell all the land.

Mr. Rogers:

Q. The first deal under option fell down because the two of you couldn't agree on the kind of security you could get, is that right?

A. That is right.

Mr. Rogers: That is all.

Mr. Wright: I just want to offer that option agreement, I think I merely identified it, and it should be marked as [fol. 857] in evidence.

Mr. Rogers: No objection.

(Thereupon the option agreement, previously marked for identification, was received in evidence and marked as Plaintiff's Exhibit P-60).

Mr. Rogers: I wish to move to strike the testimony of this witness on the ground that it is not binding, on the ground it merely is purely a local situation and that it is immaterial.

The Court: Denied. One other question I had in mind. [fol. 858] The Court: It seems to me we would save a lot of time if we could get together on a lot of things that there does not seem to be any controversy over. I supposed the purpose of our first adjournment was to enable this to be done. I do not think we should spend any time on matters that are not in controversy or that cannot be controverted, you might say. I suppose we could save a lot of time and labor.

Mr. McKay: Your Honor, this was served on me today. I will say that last wek I did get together with some of these gentlemen and we were making a little progress, but the imminence of the trial and the fact that Mr. Rogers and Mr. Richardson were totally unprepared, and I had to refresh my memory over a period of two years, that sort of made it necessary to devote all our time to that phase of the work. We are suspending on Thursday, according to my understanding, and I told Mr. Wright, or one of the gentlemen, that after that, during the recess, we would try to accommodate them as much as possible and would admit everything that we could possibly admit. They have not [fol. 859] been prejudiced.

The Court: Do you intend to go on next week?

Mr. Rogers: In addition to that, when I came into the case I came in with that in view because I definitely have a case they are holding now from day-to-date in New York County Supreme Court that I have got to go to trial on. It will probably take the greater part of next week to dispose of. My client there is in the Service, and if we do not try it now it will go over to October and I do not know if he will even be here then.

Mr. Wright: If your Honor please, I suppose he came into this case with full knowledge of prior commitments.

The Court: He came in with the knowledge that we had an understanding of when we would adjourn. We had a definite understanding at that time and my point is that if we can go along—this is done for the convenience of Mr. Richardson. He said he had to go into a matter on the 12th.

Mr. Richardson: Just as soon as we had an understanding,

in which the Court was very kind to me, I immediately [fol. 860] took it up with Mr. McKay, who thereupon took it up with Mr. Rogers, and both of their appointments, particularly those of Mr. Rogers, were based upon my informing him what our arrangement was, so that to a certain extent my inability inconvenienced both the Court and Mr. Wright, because I based it on that, and Mr. Rogers is in much the same situation as I am. It was after that that I took it up with Counsel here because my own arrangements were such that I asked whether we might not pause on Thursday night, to which no objection was made. We have our reservations to leave here on Thursday night with the idea of thereafter reconvening when those obstacles are out of the way and the Court is free to go on with the case. When I obtruded my views on your Honor at the beginning of this situation I thought then, as I think now, that if we hadn't had this aborted hearing of a few witnesses before the long adjournment we would have saved the time of the Court and Counsel, because it is a most difficult thing to come in in this way. Until this afternoon, [fol. 861] when it was laid on the table in front of me, I never saw a very important document that there is in this case. We are to pause on Thursday and between the time we again resume it seems to me can get together with Counsel and have this thing presented in an orderly way where everything we can concede will be presented, and the ultimate result will be that your Honor's time on the Bench will be kept at a minimum.

The Court: I think when we began there was an effort made to do so. I think under the circumstances we will have to adjourn on Thursday night.

Mr. Wright: For how long, your Honor?

The Court: Any time after the middle of August.

Mr. Wright: There would not be any possibility of anything before the middle of August?

The Court: I have a term in July.

Mr. Wright: We are particularly interested in getting the evidence in the case heard and out of the way. I have Fall commitments myself. I would be very anxious to complete the taking of the testimony certainly by the middle of September, if it is at all possible, or before that. What [fol. 862] is the date in August that would best suit your Honor's convenience?

The Court: Any time after the middle of August.

Mr. Richardson: There is no need of us not being realistic in this matter. It will take Counsel more than a month to complete his case because we were told by Counsel when we came here that it would take five or six weeks to put in the Government's case. We are going to have in this case a necessary hiatus after the Government's case is in for us to get our feet under ourselves, and your Honor says we cannot start before the 15th of August, and if Mr. Wright has any hope of being free for his other commitments by the 15th of September——

The Court: I did not so understand it.

Mr. Richardson: That is what he just said.

Mr. Wright: I said we would hope to finish the conclusion of our testimony, and I think we could finish it in ten or twelve days of testimony, provided this promised cooperation were ever forthcoming. This case was on two years ago.

The Court: When do you want to put it down for?

[fols. 863-866] Mr. Wright: I would say the 15th of August.

Mr. McKay: Let us put it down for the 15th of August.

The Court: What day is that?

Mr. Rogers: That is Tuesday.

The Court: All right.

(Whereupon an adjournment was taken until Wednesday, June 7, 1944, at 10 o'clock A. M.)

[fol. 867] United States District Court, Western District of New York

Civil Action No. 223

United States of America,

vs.

Schine Chain Theatres, Inc., et al.

Trial continued before the Honorable John Knight, United States District Judge, without a Jury, United States Court House, Buffalo, New York, Wednesday, June 7, 1944, at 10 o'clock A. M.

Appearances:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Albert Boggess, Esq., Philip Marcus, Esq.,

and Milton Kallis, Esq., Special Assistants to the Attorney General, in behalf of the United States of America.

Edmund McCarthy, Esq., Attorney of Record; Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur J. Homans, Esq., Howard M. Antevil, Esq., and Seth Richardson, Esq., of Counsel for Defendants.

[fol. 868] PROCEEDINGS

Mr. McKay: Your Honor will recall yesterday afternoon Mr. Arthur Buck identified a photostat of a letter from him to Mr. William Rogers. I believe the number is Plaintiff's Exhibit 58. The distributors have located the original of that letter and, as it is more legible, I would suggest that that be substituted for the photostat.

Mr. Wright: There is no objection from us.

Mr. McKay: There is no objection to the photostat, but this is easier to read. And the distributors have also located Mr. Rogers' reply to Mr. Buck, and I would like to have that marked for identification as well.

Mr. Wright: No objection. That reply, I suppose, should be marked with the next Defendants' number. Of course there is no change in number on the other one.

(Thereupon the original letter referred to was substituted for photostat and marked as Plaintiff's Exhibit P-58.)

(Thereupon the letter of April 8, 1936, referred to, was marked as Defendants' Exhibit D-26 for identification.)

[fol. 869] Mr. Kallis: If the Court please, I would like to ask Sergeant DeToto a few more questions. I notice that the transcript seems to be in error with respect to one or two answers that he gave yesterday.

RICHARD DETOTO resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination (continued).

By Mr. Kallis:

Q. Calling your attention, Sergeant DeToto, to the two years, namely, from July 1, 1934, through June 30, 1936, during which you operated both on your own account and

for Mrs. Ricordello the Seneca Theatre in Seneca Falls, New York, will you please state what the admission price for main floor seats of the Seneca Theatre was?

A. 10 and 15.

Q. Ten cents——

A. For children.

Q. And 15 cents for adults?

A. That is right.

Q. And that is for the evening performance?

A. That is right.

Q. You gave some testimony yesterday with reference to [fol. 870] having talked with representatives of the United Artists and Paramount concerning the buying of film for the Park Theatre in Geneva, New York. Were those the only companies with whom you discussed this subject?

A. No.

Q. Will you please state whom else, if any, you discussed this matter with?

A. Warner Bros.

Mr. Rogers: May we get the date?

Mr. Kallis: I will ask him when and where as soon as he says yes or no.

A. Warner Bros.

Q. You did discuss the subject matter with Warner Bros?

A. That is right.

Q. When was that?

A. It was on the same date, some time in the early part of August.

Q. Of what year?

A. 1939; on Franklin Street at Warner Bros. I don't remember the number.

Q. In Buffalo, New York?

A. That is right.

Q. Whom did you see there?

A. Miss Ruth Rappaport.

Q. Was she a stranger to you or had you known her before?

[fol. 871] A. She was no stranger. I had known her.

Q. How many times had you seen her before that occasion, approximately?

A. About a dozen times.

Q. And where?

A. In Warner Bros. office in Buffalo, New York.

Q. And in connection with what business, if any?

A. Booking pictures for the Palace Theatre at Clifton Springs, New York.

Q. What did you say to her on that occasion in August of 1939, when you had this discussion concerning buying film for the Park Theatre at Geneva?

Mr. Rogers: I object to that, may it please the Court, on the ground we have no testimony as to who Miss Rappaport is, what her connection is with the Warner Company, what her duties were.

The Court: Had you dealt in the purchase of pictures prior to this?

The Witness: Not in the purchase of pictures but with the booking of pictures.

The Court: Booking pictures?

The Witness: I merely asked her——

Mr. Rogers: One moment, please. His testimony is he never had any dealings——

[fol. 872] The Court: Was there anybody else there besides her?

Mr. Kallis:

Q. Did you ask for any one else?

A. I did.

Q. Whom did you ask for?

A. I asked her for Charlie Rich, the Warner Brothers' manager.

Q. What were you told?

Mr. Rogers: I object as not binding, hearsay.

The Court: Did you see him?

The Witness: No, I didn't see Rich. I saw Miss Rappaport. Rich was out.

Q. Mr. Rogers is becoming pretty technical, and if the Court please, I can enlighten the situation very easy. Will you tell the Court what you mean by a person at Warner Brothers who did the booking? What conversations had you previously had with Miss Rappaport with reference to booking pictures?

Mr. Rogers: Pardon me. This witness has testified he never spoke with Miss Rappaport about buying pictures.

The Court: That is right. You have two questions in one, I think.

Q. When you said you spoke with Miss Rappaport in reference to booking pictures, please give us the nature of the conversation?

[fol. 873] A. What Miss Rappaport said isn't material. She merely said the salesman would be sent around.

The Court: Explain first what you mean by booking?

The Witness: By booking pictures, as soon as the pictures are made available to a theatre, you can either book by mail or come to Buffalo and book them.

The Court: What do you mean by booking?

The Witness: You sit down with a booker and work out dates on which you desire to use the pictures.

Q. If the picture is not available to a theatre at any time, or if it is available at some times and other times does the booker advise you on that?

A. She does or he does.

Mr. Rogers: May I interrogate the witness, sir?

The Court: I don't think it is necessary. I think it is competent. Proceed.

Q. What did Miss Rappaport tell you on that occasion in August, 1939, when you went to Warner Brothers' office in reference to booking pictures?

Mr. Rogers: It was not booking. Buying pictures.

Q. Buying pictures for the Park Theatre in Geneva, New York.

Mr. Rogers: Then I press my objection, may it please the Court.

The Court: Overruled.

[fol. 874] The Witness: She told me that Mr. Rich was out and that Mr. Howard Minsky for that territory for the Warner Brothers would contact me at Clifton Springs in regard to the Park Theatre at Geneva, New York.

Q. Did you contact Mr. Howard Minsky?

A. I did.

Q. What had been your previous dealings with him?

A. I had purchased film from him for the Palace Theatre at Clifton Springs, New York.

Q. Did he call upon you at Clifton Springs, New York, after this conversation?

A. He did.

Q. When?

A. Some time thereafter, some time in August or early part of September. I am not sure.

Q. Within a month after this conversation with Miss Rappaport, is that right?

A. Yes.

Q. What was said?

A. He said that he could not give me any definite second-runs for the Park Theatre, but he could give me a contract which read either second or third-run, depending on whether Schine saw fit to run the pictures on second-run.

[fol. 875] Mr. Kallis: I think that is all.

By the Court:

Q. You dealt with Minsky, before, you say?

A. I had, sir.

Q. In booking?

A. Buying pictures.

Q. Through Warners, you mean?

A. That is right, sir.

Q. How long?

A. About a year I would say.

Q. At Clifton Springs?

A. That is right, sir.

The Court: All right, Mr. Rogers.

Mr. McKay: Of course, your Honor, we have the same objection to this conversation with the salesman that we have been pressing right along.

The Court: Yes.

Cross-examination.

By Mr. Rogers:

Q. When did you actually have your first connection with the Seneca Theatre?

A. Some time in July, 1933—1934

Q. July of 1934, you say?

A. That is right.

[fol. 876] Q. And in what capacity did you have your connection at that time?

A. I was manager.

Q. Manager for whom?

A. Mrs. Louis Ricordello of Syracuse, New York.

Q. Did she have a lease on that theatre?

A. She did.

Q. Do you know when that lease expired?

A. June 30th, 1935.

Q. When did you start your negotiations to obtain your lease which started in June, 1935?

A. What was the question?

(Last question read.)

The Witness: Some time in May, 1935.

Q. That was while Mrs. Ricordello's lease was still in existence?

A. That is right.

Q. With whom did you negotiate that lease?

A. Mr. Marsh.

Q. And is that the same Mr. Marsh connected with the Seneca Falls Savings Bank about whom you testified on direct examination?

A. It is.

[fol. 877] Q. And how long did you carry on your negotiations with him for that lease?

A. Several weeks, I believe.

Q. During any time prior to the making of your lease which starts in June of 1935 did you have any lease of any kind on that theatre, either oral or written?

A. Will you repeat that, please?

Q. (Question read.)

Mr. Kallis: If the Court please, I think that that is calling for a legal conclusion of the witness. If he wants to ask Mr. DeToto what his conversations were with anybody connected with the Seneca Bank I have no objection.

Mr. Rogers: This is cross-examination.

The Court: Overruled. Prior to July did you have any lease on this theatre?

The Witness: Prior to July?

The Court: Prior to the time you negotiated with Marsh.

By Mr. Rogers:

Q. In June; the written lease is from June, 1935, to the end of June, 1936.

The Court: You said you were working for some woman and managing the theatre.

The Witness: I still don't know what you mean by it?

Q. Did you ever have any lease on that Seneca Theatre [fol. 878] other than this written lease we have in evidence here that started in June of 1935 and ran to the end of June, 1936?

A. Prior to the time that this lease was signed, which was June 3rd?

Q. Yes.

A. No.

Q. I recall your testifying under direct examination that first you had an oral lease and then you had a written lease. Is that so?

A. That was for the year following, 1936; not 1935.

Q. You mean you had an oral lease in 1936?

A. I didn't have an oral lease.

Mr. Rogers: I can't hear you.

Mr. Kallis: I can't either, Mr. DeToto. I am sorry.

A. I know what Mr. Rogers is aiming at.

Q. I am not aiming at anything. I am just aiming at your testimony. You said you had an oral lease and then you had a written lease.

A. You have got your dates mixed.

Q. Did you ever have an oral lease before you made this written lease?

A. Yes, I did.

Q. An oral lease?

A. For what year?

Q. I asked you just now——

[fol. 879] The Court: You mentioned June, 1935. He wants to know before that.

Mr. Rogers: Exactly.

A. For this original lease or for a lease after that?

Q. I am asking you before this written lease did you ever have an oral lease?

Mr. Kallis: Before what date, Mr. Rogers?

Mr. Rogers: Before June of 1935. I have asked him that four or five times now.

Q. Didn't you?

A. An oral lease for what?

Q. Any time before June of 1935.

A. No.

Q. Then when you testified on direct examination that first you had an oral lease prior to June of 1935 and then you got your written lease, which started in June of 1935, that was not accurate, was it?

A. I still don't know what he is talking about.

Q. You understood what Mr. Kallis was talking about when he directed his questions to you on direct examination, didn't you? Well, did you or didn't you?

A. Will you be explicit?

Q. You just answer my question and stop arguing.

A. I can't answer a question like that.

Mr. Kallis: If the Court please, the witness is not [fol. 880] arguing. I submit he is very respectful to this thoroughly experienced cross-examiner and there is not any parity between the two of them.

The Court: This witness should be able to understand it.

Mr. Rogers: A thoroughly experienced cross-examiner has not received any direct answer as yet.

The Court: You testified something about an oral lease. When was that that you had any oral lease on this Seneca Theatre?

The Witness: The oral lease with the privilege to renew for the year ensuing, 1936-1937, was made at the time that lease was signed, on June 3, 1935. Whether he has reference to the original lease I don't know, sir.

The Court: That is a verbal lease, an oral lease.

The Witness: But he does not mention which lease.

The Court: You have only testified to one oral lease. Y[illegible] say now this oral lease was made at the time you made t[illegible] written lease.

The Witness: Your Honor, at the same time he asked me if I had been negotiating for the prior lease——

Mr. Rogers: The witness seems to be wishing to argue with the Court. I want answers to questions, not arguments now, Mr. DeToto.

[fol. 881] By Mr. Rogers:

Q. Then is it your testimony that you never had an oral lease under which you occupied these premises and operated these premises; is that right?

Mr. Kallis: Do you understand the question, Mr. DeToto?

The Witness: No, I don't.

Mr. Rogers: One moment, Mr. Kallis. It seems to me he understood, may it please the Court, all of Mr. Kallis's questions.

The Court: The witness can state if he does not understand.

Q. In other words, you don't understand my questions, do you? Is that right?

A. If you will be explicit——

Q. Just answer my question. Do you understand my question?

Mr. Kallis: Just a moment. If the Court please, the word "lease" is a word you find in Webster's Dictionary and you also find it in a great many law books.

Mr. Rogers: And also the Encyclopedia Brittanica.

Mr. Kallis: And the meaning of it may not be clear to this witness.

The Court: I think the meaning is clear. When you refer to an oral lease do you refer to what you claim was an option given you or an agreement made with you at the time this [fol. 882] written lease was made that you should have the right to renew that lease? Is that what you mean?

The Witness: Your Honor, he asked me——

The Court: What do you mean by an oral lease? I do not know what you mean by it.

Mr. Kallis. May the question be read, if the Court please?

The Witness: There are two dates——

The Court: Never mind. Just listen to the question.

Mr. Kallis: May the reporter read your question?

Mr. Rogers: May I read to the Court exactly what this witness testified?

Mr. Kallis: If the Court please, I would like to have Mr. DeToto answer your Honor's question.

The Court: I will withdraw my question for the present. We will see what the previous testimony was.

Mr. Kallis: What page is that on, Mr. Rogers?

Mr. Rogers: Page 756.

By Mr. Rogers:

Q. Do you remember these questions being asked of you yesterday and you giving these answers:

"Q. Who at that time (meaning June, 1935) was the owner of the building in which the Seneca Theatre at Seneca Falls, New York, was located?

A. The Seneca Falls Savings Bank at Seneca Falls, New York."

You remember that question and that answer, don't you?

[fol. 883] A. I do.

Q. "Q. And were you given an oral or a written lease?

A. At the time the lease was consummated"——

Then some motions were made and then the question was re-read to you:

"The Witness: Yes, I was.

The Court: Which was it?

The Witness: It was oral.

A. At the time the lease was consummated——

The Court: Which was it?

The Witness: It was oral.

Q. Did you later receive a written lease from the Seneca Falls Savings Bank?

A. Later."

Now, do you remember those questions being propounded to you and you giving those answers?

A. Yes, I do.

Q. Which oral lease were you talking about that was given to you and then a written lease given to you later?

A. The lease is self-explanatory. The oral privilege was given at the time the lease was consummated and then the lease was later mailed to me.

Q. Your testimony is that first you got an oral lease and then later you got the written lease?

A. No, the lease for the one year.

[fol. 884] The Court: We are talking about 1935, the year this written lease was made. You should understand this question. It is clear and definite. When did you make an oral lease he wants to know?

The Witness: An oral lease, a privilege to renew, was made at the time my one-year lease was consummated. That explains itself.

Mr. Rogers: May it please the Court, that is not the testimony.

The Court: That is his testimony now.

Mr. Rogers: That is his testimony now but it was not his testimony on direct.

The Court: How could there be an oral lease and a written lease consummated at the same time?

The Witness: Your Honor, the Bank gave me the one-year lease and——

The Court: You had a one-year lease in writing?

The Witness: Yes. At the time it was made I told them that was not very much of a lease, considering that I had to go in there and work and build up a business. They assured me I had nothing to worry about, that I would be given first opportunity.

The Court: That is what you mean by an oral provision not in the lease?

[fol. 885] The Witness: That is right.

By Mr. Rogers:

Q. How old are you, Sergeant?

A. Thirty.

Q. At the time you were carrying on these negotiations to make this lease you were 21 years old, weren't you?

A. About that, I believe.

Q. Now, did you have a bank account at that time?

Mr. Kallis: If the Court please, I object to that. It does not relate, even indirectly, to anything concerning which he gave testimony yesterday.

The Court: Overruled. This is cross-examination.

Mr. Kallis: If the Court please, I would like to know what his purpose is.

The Court: It is cross-examination. Overruled.

Q. Answer the question, please.

A. I believe I had. I don't recall.

Q. You don't recall whether or not you had a bank account?

A. No.

Q. Where do you believe you had a bank account at that time?

A. I did have a bank account in Geneva. I don't recall whether it was that year or not. It may have been previous. Years previous to that I did have.

Q. You mean previous to the time you were 21 years old you had a bank account in Geneva?

[fol. 886] A. That is right.

Q. In which bank did you have that bank account in Geneva?

A. The First National Bank.

Q. Is that what you believe or is that what you know?

A. I did have an account.

Q. You mean you did have an account in that particular bank in Geneva in 1934?

A. I believe it was 1934. I would rather not commit myself on the bank account. I did have a bank account in the city of Geneva in one of the banks some time in 1933 or 1934. I don't recall which bank. I would rather not commit myself.

Q. Are you sure you had a bank account in any bank in Geneva in 1933 or 1934?

The Court: He said he did have.

Mr. Rogers: He said he believed he did, but he won't commit himself.

The Witness: I mean it is a long time. It may have been in my dad's name. I was working at the Schine Optical Company. I did have a bank account. It may have been in my dad's name. I don't recall. It is a long time.

Q. Then you don't recall whether you had a bank account in Geneva?

A. Let me skip that.

[fol. 887] Q. You don't skip things. I am skipping them.

A. No, I don't.

Q. At any time during the year 1935 did you have a bank account anywhere?

A. 1935?

Q. Yes.

A. The same answer. No, I don't recall.

Q. You did not, did you?

A. I don't recall.

Q. As a matter of fact, don't you know you didn't have a bank account anywhere in 1935?

Mr. Kallis: Just a moment. I object to that type of cross examination.

The Court: Sustained. He says he does not recall.

Q. Let me ask you this: Did you have a bank account anywhere in the year 1936?

A. Did I have a bank account anywhere in the year 1936?

Q. Yes.

A. Yes, I did.

Q. Where?

A. The Seneca Falls Savings Bank, Seneca Falls, New York.

Q. That is a savings bank account, is that right?

A. That is right.

Q. Do you remember how much you had in that account of April of 1936?

[fol. 888] Mr. Kallis: I object, if the Court please, improper cross examination.

The Court: What is the materiality of this?

Mr. Rogers: In just a moment I will show you the materiality, your Honor. I promise to connect it.

The Court: Overruled.

A. I don't remember the amount.

Q. Do you remember approximately how much you had in that savings bank account?

A. No, I don't.

Q. Was it more than a hundred dollars or less than a hundred dollars?

A. It was more, I should say. It was a few hundred dollars.

Q. You possibly had $200 in that account, you mean?

A. Something like that.

Q. When you spoke with Mr. Marsh in April of 1936 you say at that time Mr. Marsh told you that he wanted to sell the property in which the Seneca Theatre was to you?

Mr. Kallis: I object to that, if the Court please. He did not say that on his direct examination.

Mr. Rogers: He most certainly did. He even said the price.

Mr. Kallis: I don't recall that he testified to that effect.

Mr. Rogers: He even mentioned the price, may it please the Court.

Mr. Kallis: A price of $9,000 was mentioned as the price [fol. 889] that was set for it in this option.

The Court: Ask him if he did testify to that.

Q. You did testify, did you not, that you spoke with Mr. Marsh in 1936 and he said he would like to sell you the property?

A. He said he would like to sell.

Q. And you said he mentioned a price of $9,000?

A. That is right.

Q. You also testified he said you didn't have to pay all cash?

A. That is right.

Q. You could pay part cash and part on mortgage?

A. That is right.

Q. Well, did he tell you how much cash and how much mortgage would be required to purchase the property?

A. He mentioned a few thousand would be sufficient; the rest on mortgage.

Q. In other words, he said a few thousand dollars would take it in cash and the rest would be in mortgage?

A. That is right.

Q. By a few thousand dollars what was your understanding, two or three thousand dollars or four thousand dollars, or what?

A. About three.

Q. About $3,000?

A. That is right.

[fol. 890] Q. Didn't you testify you told him you had plenty of money to buy it but you would rather use that money to improve the property; is that right?

A. I didn't say I had plenty of money.

Q. Did you say you had money sufficient to make the deal, but you told him you would rather use that money to improve the property?

A. I knew where to get it.

Q. No. Didn't you say you had it?

A. I said I had. I didn't say plenty of money.

Q. You said you had enough money to make that deal?

A. That is right.

Q. Did you at that time have $3,000 in any bank account?

A. No.

Q. As a matter of fact, didn't you tell Mr. Marsh at that time that you couldn't buy the property because you didn't have any money?

A. I did not.

Q. You mean you never told Mr. Marsh that you couldn't buy this property because you didn't have the money?

A. I did not.

Q. In 1935 or 1936 did you personally have any money invested in the Seneca Theatre? Personally, I mean, you personally.

A. I don't quite know what you mean.

[fol. 891] By the Court:

Q. Did you have any interest in the deal there?

A. I was paying the bills, operating the business.

Mr. Rogers:

Q. You were paying the bills out of the money that came in the box office, weren't you?

A. That is right.

Q. Outside of that you had no money in the theatre, did you?

A. Not in the equipment.

The Court: Were you part owner of the property, he wants to know? Did you have any investment in the business there?

The Witness: No, not in the property.

Mr. Wright: If the Court please, I suppose it is an investment in the enterprise.

The Court: Were you working for hire?

The Witness: I was operating the theatre myself, sir.

Mr. Rogers: That was during the period he was operating the theatre I am talking about, your Honor.

Mr. Kallis: That is the first year for '34 and '35.

The Court: You are talking about '34 and '35?

Mr. Rogers: No, 1935-'36 just now, when he was operating.

The Court: All right.

Mr. Rogers: His testimony was he had no investment in it.

Mr. Wright: The testimony is he had no investment in [fol. 892] the form of money. I repeat it is quite apparent he had an investment such as anybody does who tries to run a business.

Mr. Rogers: That is Mr. Wright's testimony. Now let us see if that is your testimony.

The Witness: I didn't hear what he said.

Mr. Rogers: You missed something. You missed something very interesting. He was testifying for you.

The Court: Never mind.

Mr. Rogers:

Q. Mr. De Toto what investment did you have in the Seneca Theatre of any kind, when you operated in 1935-'36?

A. I was operating the business. I had film contracts, rent and everything.

Q. I am asking you a simple question: Did you have any money invested in that theatre?

A. Pertaining to what?

Q. Pertaining to anything?

A. You mean the building, the equipment of it?

Q. Anything?

A. No, I didn't.

Q. You spoke about having some talk with Mr. McDermott about building a theatre? Who was to furnish the money if that theatre ever was built?

[fol. 893] A. Mr. McDermott would build the building and I would equip it.

Q. When you say you would equip it, what do you mean by that?

A. I would furnish the seats, projection equipment, screen, marquee, whatever else was need-.

Q. And you would buy that equipment you mean?

A. That is right.

Q. What would that equipment and seats and projection machine and marquee and box office equipment cost for a theatre of that kind?

A. Do I have to answer that question?

Mr. Kallis: Yes.

The Witness: The price varies.

Q. You said you had plans and specifications drawn?

A. I did have.

Q. Based on those plans and specifications, how much did you estimate those seats and equipment, box office equipment and other equipment for that theatre would cost?

A. About $7,000.

Q. How much?

A. $7,000.

Q. About $7,000, and to the best of your recollection you had about $200 in the Seneca Theatre Savings Bank, is that right?

A. That is right.

[fol. 894] Q. You also say you were trying to make a deal for Mr. Nearpass to build a theatre?

A. That is right.

Q. You had a set of plans on that?

A. That is right.

Q. Who was to put the money in that theatre, you or Mr. Nearpass?

A. Mr. Nearpass.

Q. He was — put it all in?

A. That is right.

Q. Not a dollar from you?

A. That is right.

Q. During the time when you were operating the Seneca Theatre under this lease made to you that lease was made to you and your brother and not you alone?

A. My dad was co-signer. I just became of age, something like that.

Q. That was your father?

A. Yes.

Q. During that period you said that the Strand Theatre had bank night, is that right?

A. What period is that?

Q. I said when you were operating the theatre under your lease?

A. Had bank night when the Schines had it.

[fol. 895] Q. The Schines had it during the period you were operating your lease at the Seneca?

A. Not all the period. They took it in September. Bernstein had it prior to that.

Q. Wasn't it during part of the time you were operating the Seneca Theatre that the Schines were operating the Strand Theatre?

A. That is right.

Q. Wasn't it during that period you said that the Schines had bank night?

A. That is right.

Q. And they have give-aways, too?

A. That is right.

Q. Did you have any give-aways at the Seneca Theatre?

A. I did.

Q. What kind of give-aways did you have?

A. Treasure night.

Q. Isn't treasure night the same as bank night?

A. It is.

Q. That is, you set up a pot of money and they draw for it and the lucky winner gets the pot?

A. That is right.

Q. How big a pot would you have in your bank night?

A. I don't recall. It wasn't very much.

Q. About how much?

[fol. 896] A. It was below $100.

Q. Below $100?

A. Yes.

Q. In other words, would it vary from $25 to $100?

A. That is right.

Q. As I recall you testified that you went to Canandaigua and you spoke to a Mr. Marks about building a theatre in Canandaigua, is that right?

A. That is right.

Q. And at that time the Schines actually had a theatre in Canandaigua, didn't they?

A. They did.

Q. And that theatre was not built by you or Mr. Marks, as you testified, is that right?

A. It was not.

Q. In that theatre who was to put the money into that theatre?

A. The discussion was very slight.

Q. You never discussed terms, or who was going to build?

A. No. Schines——

Q. One moment.

Mr. Kallis: Let him finish his question, Mr. Rogers. Just a moment. Have you finished your question, Mr. De Toto?

Mr. Rogers: I have finished the question.

Mr. Kallis: He was talking and Mr. Rogers interrupted him.

[fol. 897] Mr. Rogers: It was not responsive to the question.

The Witness: What was the question?

Mr. Rogers: I am asking you.

Mr. Kallis: He is giving the answers.

Mr. Rogers: He is giving the answers he should give legally.

Q. When you spoke to Mr. Marks, was there any discussions to what kind of a theatre you would build?

A. No, there was not.

Q. Was there a discussion as to how much the theatre would cost?

A. No.

Q. Was there any discussion as to who would pay for the building?

A. Not a thing.

Q. You said you went to Clifton Springs?

A. That is right.

Q. Did you operate a theatre there for somebody?

A. I managed the theatre.

Q. You managed it?

A. That is right.

Q. Did you have any investment in that theatre?

A. No.

Q. You went to Mt. Morris, didn't you?

A. Yes.

[fol. 898] Q. Did you operate a theatre there?

A. I did.

Q. Did you have any investment in it?

A. I did.

Q. You did or you didn't?

A. I did.

Q. What investment did you have in Mt. Morris?

A. Well, marquee, sound, R.C.A. sound, new screen, carpet, new frames, lighting fixtures, that is about all, I believe.

Q. And did you personally sign these contracts for this equipment you are talking about?

Mr. Kallis: If the Court please, I object to that.

The Court: The question is whether he bought them.

Mr. Kallis: There was nothing said about this on direct examination yesterday.

The Court: It all goes to the same point.

Mr. Rogers: It all goes to the same point.

Q. Did you?

A. I don't remember.

Q. Don't you remember whether you did or not?

A. Or the landlord did.

Q. You think maybe the landlord signed those contracts and not you?

A. I don't recall.

[fol. 899] Q. Did you ever pay for that equipment?

A. Did I ever pay for the equipment?

Q. Yes.

A. I paid for part of it until I was drafted.

Q. Please.

A. Your questions are one-sided, Mr. Rogers.
Q. Please answer the question.
A. I was drafted and then, naturally, the other people assumed the balance.

The Court: Just answer his question.

Q. Did you ever pay for it in full, I said?
A. No, I was drafted.

Mr. Kallis: He answered it.
The Court: You said you paid for it. Now the question is did you pay for it in full? Did you?
The Witness: No.

By Mr. Rogers:

Q. About how much did you pay for it? What part of it and what part did you leave unpaid?

The Court: You have two questions there. What was your investment in the Mt. Morris Theatre?
The Witness: I don't recall, sir. It was just prior to my being drafted.

Q. Don't you recall how much the total amount of the obligations you assumed on that equipment?
[fol. 900] A. What is it you want to know?

Mr. Rogers: Let the reporter read the question to you.
The Court: In other words, how much were you to pay for the equipment you say you purchased?
The Witness: I believe it amounted to several thousand dollars.

Q. When you say several thousand dollars, how many thousand dollars was it, do you know?

The Court: Several thousand or a thousand?
The Witness: Several, two thousand.

Q. Several thousand dollars. How long were you really operating the Mt. Morris or managing it?
A. Operating it.
Q. You were operating it?
A. For myself.
Q. How long did you operate that theatre?
A. I believe it was from October, 1940 until I was drafted in April, 1941, as near as I can recollect.

Q. You only ran for a few months, is that right?

The Court: October to April.

Mr. Rogers: Yes. I want to be sure these dates are right.

Q. Those dates are right, from October, 1940 to April, 1941?

A. That is right, about.

Q. Did you have any connection with a theatre in Syracuse?

[fol. 901] A. I did.

Q. Which theatre was that?

A. The Capitol Theatre.

Q. And when did you get your interest in that Syracuse Theatre?

Mr. Kallis: If the Court please, he didn't say he had an interest in it. He said managed.

The Court: I thought he did say he had an interest.

The Witness: No, he has reference to another theatre.

Mr. Rogers:

Q. Talking about Syracuse now.

A. Capitol Theatre in Syracuse, that is right.

Q. Didn't you testify yesterday it was the Avon Theatre in Syracuse?

A. That is the theatre I managed.

Q. Pardon?

A. I testified that is the theatre I managed.

The Court: Speak louder. That is the theatre you managed?

The Witness: I managed the Avon Theatre. I don't think Mr. Rogers has reference to that theatre. He has reference to the Capitol Theatre.

Q. When did you manage the Avon Theatre in Syracuse?

A. Shortly after I lost my theatre in Seneca Falls, possibly in the fall.

[fol. 902] Q. You mean after June, 1936?

A. No, I think it was more towards late fall.

Q. What was your interest in the Avon Theatre in Syracuse?

A. I was manager.

Q. Working for somebody else?

A. That is right.

Q. Did you ever have anything to do with any other theatre in Syracuse?

A. I did.

Q. Which theatre was that?

A. The Capitol Theatre.

Q. When did you start your interest in the Capitol Theatre in Syracuse?

Mr. Kallis: If the Court please, I object to this as being improper cross-examination. There was nothing elicited about this subject on direct examination.

The Court: Yes.

Mr. Kallis: He didn't say anything about the Capitol Theatre yesterday.

The Court: He told about his operations in Syracuse.

Mr. Rogers: Exactly.

The Witness: It was some time in early spring, 1936.

The Court:

Q. Was that directly after you were in the Avon? Did [fol. 903] you go from the Avon to the Capitol?

A. No, this was prior to that. I was still operating the theatre in Seneca Falls.

The Court: When you were interested in the Capitol?

The Witness: That is right.

Mr. Rogers:

Q. Then you mean in the spring of 1936, you became interested in the Capitol in Syracuse?

A. That is right.

Q. What interest did you have in the Capitol in Syracuse?

A. I leased it.

Q. You were the lessee?

A. Yes.

Q. Did you have any investment in that theatre?

A. I believe there was some rent in advance.

Q. Do you know how much rent you paid on the Capitol Theatre per month or year?

A. It was $125 per month.

Q. By that do you mean you may have put down a month's rent in advance as security on the lease?

A. That is right

Q. That was the extent of your investment?

A. Outside of some remodeling which I did, painting and frames, stuff like that.

Q. How much did that amount to?

[fol. 904] A. A couple of hundred dollars.

Q. What?

A. About $200, $150.

Q. How long did you operate that theatre in Syracuse?

A. About a week, I believe.

Q. Just one week?

A. That is right.

Q. And quit, is that right?

A. That is right.

Q. With reference to that equipment you spoke about that you put in the Mt. Morris Theatre that equipment was bought by you on time, wasn't it?

Mr. Kallis: If the Court please, I think this is highly improper.

The Court: Overruled.

The Witness: It was.

Mr. Rogers:

Q. And you paid installments out of the money you took in at the box office, is that right?

A. That is right.

Q. You say you operated the Seneca Theatre in Seneca Falls, right through to the end of your lease, is that right?

The Court: We have been all over this. He testified to that.

Mr. Rogers: I want to interrogate him.

[fol. 905] The Court: I don't want to go over these matters three or four times. He testified on your cross-examination.

Mr. Rogers: No sir. He said the lease had that duration. I want to know whether he operated it during the duration of the lease.

The Court: All right.

The Witness: I did except I don't quite recall, I may have dropped out——

The Court: Dropped out what?

The Witness: If I recall, it was either June 30th or June

29th I didn't operate. The last day or two of the lease because I had to get my equipment out.

The Court: That is '36?

A. That is right.

By Mr. Rogers:

Q. As a matter of fact, isn't it true you didn't operate that theatre at all for the last two weeks under your lease?

A. No.

Q. Did you cease operating that house in the middle of June, 1936?

A. No, sir.

Q. You are sure of that?

The Court: What is your best recollection of it?

[fol. 906] The Witness: It seems to me I ran it up until the second or last day of the lease.

The Court: That is your best recollection?

The Witness: It is, sir.

The Court: Best recollection is he operated up until the last day or two of the expiration of the lease.

Q. When you ceased operating Seneca Falls do you recall that you were playing R. K. O. product in that theatre first-run?

A. I was.

Q. Do you recall that when you left the theatre you left an unpaid bill of $845.74 for pictures you failed to play of R. K. O.?

Mr. Kallis: Just a moment. I object to that.

The Court: What is the materiality.

Mr. Rogers: The materiality of this is, may it please the Court, that this man who claims he had plenty of money to buy this theatre.

The Witness: I didn't claim I had plenty of money.

Mr. Rogers: Pardon me.

The Court: Objection sustained. He has already testified to this.

Mr. Rogers: He testified both ways. He testified he had plenty of money and he testified he only had $200 in the [fol. 907] bank.

The Witness: I did not testify I had plenty of money, Mr. Rogers.

The Court: Objection sustained.

Mr. Rogers: May it please the Court this is material on the basis of the desire or lack of desire of distributors to deal with the man who left unpaid bills for film hire.

The Court: Objection sustained.

The Witness: May I say something, your Honor?

The Court: No, just answer questions.

The Witness: He don't ask me the right questions.

Mr. Rogers: I know that.

Q. You testified that after you found that the Seneca Savings Bank had sold the Seneca Theatre property to Schines, that you spoke with Mr. Schafer who at that time was the manager of the Strand Theatre?

A. That is right.

Q. About a renewal of the lease. At that time in June, 1936, where were you living?

A. I believe I was living in Seneca Falls.

Q. During the time you ran this theatre from June, 1935 to June 1936, where were you living then?

A. At the time I ran it?

Q. Yes.

[fol. 908] A. For Mrs. Ricordello?

Q. No, for yourself, 1935-1936, that is when you were running it under your lease?

A. Part of the time I lived in Geneva, which is my home, part of the time I lived in Seneca Falls.

Q. Prior to May, 1936, where did you live?

A. I don't recall.

Q. Don't you recall you lived in Geneva in May and June, 1936?

A. I don't remember whether I did or not.

Q. In May and June of 1936 where did Mr. Clinton Young live?

A. I believe he lived in Geneva.

Q. Don't you know he lived in Geneva?

A. He is always on the road. You can't tell where he is.

Q. Don't you know where his home is?

A. I believe I do.

Q. You know his home was Geneva in the month of May and June, 1936, don't you?

A. I would say it was.

Q. You would say it was?

A. Yes.

Q. How far is Geneva from Seneca Falls?

A. About 10 miles.

Q. You testified that Mr. Young was very kind and very nice to you and wished you good luck and your relations [fol. 909] with him were always friendly, is that right? (A pause). Is that right?

A. I didn't say our relations were always friendly.

Q. Did you testify he came in and he visited you in a friendly way how to run your house and wished you luck when you had the house?

A. Yes, one month prior to Schines taking over the other theatre.

Q. After you spoke with Mr. Schafter did you attempt to speak with Mr. Young at Geneva, only 10 miles away from where you lived, in regard to getting a lease?

A. No.

Q. You knew at that time Schine's office was in Gloversville, New York?

A. We did.

Q. Did you write them any letter asking them would they give you a lease?

A. No. Your Honor, can I explain?

The Court: Just answer counsel's questions.

The Witness: They were as much as implying that they would lease the theatre which is ridiculous.

Mr. Rogers: I move to strike the voluntary statement.

The Court: Strike it out. Just answer the question.

Q. With reference to the Park Theatre in Geneva, do you remember whether that was a newly built theatre? [fol. 910] A. What do you mean by newly built?

Q. I mean built from the ground up.

A. I believe it was partly.

Q. You say partly, what do you mean by that?

A. Well, by that I mean it was more or less converted, part of the old structure was allowed to remain, part of it wasn't.

The Court: Keep up your voice. You can speak so we can all hear you.

[fol. 911] Q. Now, as a matter of fact, the building that was there before the theatre was put into it was a hotel called the Park Hotel, wasn't it?

A. That is right.

Q. And that Park Hotel burned down; is that right?

A. Yes.

Q. And the four walls were practically about what was left?

A. That I don't know.

Q. You don't know.

A. No.

Q. At the time when this Park Theatre was built was there any other theatre in Geneva?

A. Any other theatres?

Q. Yes.

A. Yes, three.

Q. What were the names of those three theatres?

A. Schine's Geneva, Regent, and Temple Theatres.

Q. There were three of them, and they were all three operated by Schines at that time?

Mr. Kallis: Just a moment. He didn't say that all three were operated at that time.

Mr. Rogers: I asked him a question. This is cross-examination.

Mr. Kallis: Ask him instead of suggesting the answer.

Mr. Rogers: Wait a moment, Mr. Kallis. I think I know how to cross-examine.

[fol. 912] The Court: Go ahead.

A. What was the question, please?

The Court: Read the question.

(Question read.)

Q. Were they, I say? Is that right?

A. They were controlled by Schine. Two of them were being operated. Does that answer your question?

Q. In other words, Schine had all three; is that right?

A. That is right.

Q. And he was operating two; isn't that right?

A. That is right.

Q. And other than those three theatres there were no other theatres in Geneva at that time, at the time that DePillo decided to build this Park Theatre, or renovate the building into a theatre; is that right?

A. Yes, sir.

Q. And DePillo was not a theatre operator, was he?

A. That is right.

Q. Did you put any investment in that Park Theatre?

A. No.

Q. What product did you get eventually for Geneva?

A. Well, eventually I got what product I thought——

Q. Just tell us what product you got.

A. United Artists, Paramount, Monogram, Republic, Grand National.

[fol. 913] Mr. Kallis: What was that last one?

The Witness: Grand National. And I believe R. K. O.

Q. I show you these two letters, or, rather, photostatic copies, one letter bearing date January 11, 1940, and another bearing date February 3, 1940, directed to Mr. A. Felice, Park Theatre, Geneva, N. Y. And will you tell us, please, who was Mr. A. Felice, if I pronounce his name correctly? I don't know. Do I pronounce his name correctly?

A. You are still losing sight of one fact, that I don't know too much about the Park Theatre. I was only the buyer.

The Court: Who was this individual?

The Witness: I believe he was a co-owner with Mr. DePillo. That is my belief, my personal belief.

Q. But you attended to the booking of pictures in the theatre; is that right?

A. That is right.

Q. In the month of January, 1940, and in the month of February, 1940, you were attending to the booking at that time, weren't you?

A. That is right.

Q. Now I show you these two letters, which are subscribed by United Artists Corporation, J. A. Bykowski, Office Manager. You knew him, didn't you?

[fol. 914] A. Yes, I did.

Q. I ask you to look at those letters, and I ask you, do you remember seeing those letters?

A. I believe I did. I don't recall definitely.

Q. But you believe you did see those letters?

A. I believe I did.

Q. And you arranged the purchase and booking of United Artists' pictures with Mr. Bykowski, didn't you?

A. I did.

Q. During that period, I mean.

A. Yes, sir.

Mr. Rogers: I offer them in evidence.

Mr. Kallis: There is no objection.

Mr. Rogers: I would like to have the two of them marked as one exhibit to save time.

Mr. Kallis: There is no objection.

(Thereupon the photostatic copies of letters of January 18, 1940, and February 3, 1940, referred to, were marked Defendants' Exhibit D-27 in evidence.)

Q. After you received the approved copies of the contracts for all of these pictures set in Defendants' Exhibit 27, did you play off all those pictures?

A. No, they didn't.

Q. Well, about what part of them did you play off?

[fol. 915] A. I don't recall.

Q. What percentage of them?

A. I don't recall.

Q. You mean it was impossible during the short period in which you ran the theatre to play all these pictures off?

Mr. Kallis: If the Court please, there is no evidence that he ran the Park Theatre. The evidence is that he bought film. That, as I understand, was his only connection with it.

Mr. Rogers: This man was a theatre operator, he said, and he bought all this film.

Mr. Kallis: But your question was as to whether those pictures were run when he ran the Park Theatre, and I don't understand that he ran the Park Theatre.

Q. In addition to buying the film for this theatre did you also supervise the management of that theatre?

A. I did not.

Q. Who really ran the theatre?

A. Mr. DePillo.

Q. And all you did was buy the pictures; is that it?

A. Buy and book the pictures.

Q. Buy and book?

A. That is right.

Q. Do you remember who signed these contracts for film service?

[fol. 916] A. I believe Mr. Felice.

Q. In addition to buying these pictures you also were supposed to book these pictures too, weren't you?

A. That is right.

Q. I want you to explain to the Court when does the booking of a picture take place?

A. It takes place after a picture is available, after a picture becomes available.

Q. In other words, then, the process is, first, the contract is made for the picture to be played at a certain theatre; is that right?

A. That is right.

Q. Then after that contract is made when the picture becomes available to be played at the theatre, then the picture is booked into the theatre; isn't that right?

A. That is right.

Q. And in booking the theatre the booker then gets in contact with the booker of the distributor and arranges the dates when these pictures are to be played in the theatre after the contract is made; is that right?

A. That is right.

Q. And that is what you did in connection with the Park Theatre; is that right?

A. That is right.

Q. You spoke about the booker for the theatre and the [fol. 917] booker for the distributor getting together to arrange the date, book the date on which the picture is to play in the theatre after the picture becomes available. When you said, "After the pictures becomes available," doesn't that mean after the theatre receives notice from the distributor that the distributor is prepared to fix a date to put that picture in that theatre; is that right?

A. I believe it is.

Q. Hasn't that been what you discovered?

A. Yesterday you said I was incompetent to know the procedure of the distributors.

Q. I am asking if you did that as a booker.

A. I usually got a letter and then booked them by mail.

Q. You would usually get a letter informing you that the picture was ready to be booked into the theatre?

A. Yes.

Q. And then you would go in and arrange the date?

A. Or I would telephone.

Q. Or you would telephone and arrange a date?

A. That is right.

Q. Do you recall visiting the office of Vitagraph trying to get Warner feature products and speaking to the manager there and he offering you product for your theatre and you declined to take it?

Mr. Kallis: Just a moment. I would like to have him fix [fol. 918] the time.

The Court: For which theatre do you mean?

Mr. Rogers: For the Geneva Theatre. That is the only one he testified about buying the product for.

Mr. Kallis: At what particular time?

Mr. Rogers: Well, at any time after August of 1939.

A. No, I don't recall.

Q. You don't recall that, do you?

A. No.

Q. Do you recall that when you went into the United Artists in August of 1939 that they offered you 1937-1938 and 1938-1939 second runs, and that they asked you prices from $25 down to $15 a feature for two or three-day run for the Geneva Theatre? Do you remember that?

A. Yes, but we were not interested in those pictures.

Q. I am asking you, do you recall that?

A. Yes.

Q. And do you remember refusing it?

A. Yes, sir.

Q. And do you remember why you refused it?

A. Yes, sir.

Q. Did you tell them you refused it because the price was too high?

A. That was one of the reasons.

Q. Isn't that the only reason you gave?

[fol. 919] A. No.

Q. You say that is not the only reason?

A. No.

Q. Now, do you remember some time in or about August of 1939 when you went to Paramount they offered a number of pictures first run release during 1937 and 1938 and also 1938 and 1939, and also offered you a number of second run pictures of 1938 and 1939, and they offered you all the product of 1938-1939 third run, as well?

A. No.

Q. You don't remember that?

A. No.

Q. Let me break it down for you. Do you remember at that visit at Paramount, when you were trying to book pictures in the Geneva Theatre, they offered you first run a number of pictures released during 1937-1938 and 1938-1939 season?

A. Yes, sir.

Q. You remember that, don't you?

A. I remember the first runs.

Q. Do you remember at that time or thereafter they also offered you second run a number of pictures of the 1938 and 1939 product?

A. They offered me some——

[fol. 920] Q. No, do you remember that?

A. I don't remember the year of the product. They did offer some old second runs, not current second runs.

Q. I am talking to you now about second run of a number of pictures of the season of 1938-1939.

A. I don't remember what season it was. I was not interested in those pictures at the time.

Q. Please don't tell me what you were or were not interested in. Did they offer them to you?

A. They offered me some pictures but I don't recall how old they were, what the season's product was.

Q. In other words, you don't recall whether it was 1938 or 1939; is that it?

A. That is right.

Q. Do you remember at that visit in August, or shortly thereafter, that they offered you third run all of the pictures of their 1938-1939 season?

A. I don't remember.

Q. You don't remember that?

A. No. I still was not interested in third run.

Q. Well, do you remember Paramount releasing any pictures to you at all in the summer or fall of 1939?

A. Yes, they did.

Q. They did, didn't they?

A. That is right.

[fol. 921] Q. Do you remember on or about September 19, 1939, they made a deal with you and contracted to furnish you with eleven pictures?

A. I believe they did.

Q. Did you play those eleven pictures?

A. We played some of them. I don't recall whether they were all played or not.

Q. You don't recall whether you played all of them though, do you.

A. No, I don't.

Q. Were you acquainted with the Schine Theatres, generally, in Geneva?

A. I believe I am or was.

Q. Did you visit the Geneva Theatre in Geneva?

A. Yes, I did.

Q. About how many seats does that theatre have?

A. Close to 2,000.

Q. And the Regent Theatre, do you know that theatre? Have you visited that?

A. About a thousand.

Q. That has about a thousand seats?

A. Yes.

Q. And the Temple Theatre?

A. About 800.

Q. And those three theatres, as you testified, were in [fol. 922] existence before the Park Theatre was built; is that right?

A. They were.

Q. About what was the population of Geneva in 1936, 1937 and 1938, do you remember?

A. To my knowledge?

Q. Yes.

A. About 18,000.

Q. I show you a letter headed "Palace, Clifton Springs, July 6, 1940," addressed to Fox Film Corporation, 290 Franklin Street, Buffalo, N. Y., to Miss Genco, and I ask you whether the signature on that letter is yours?

(Handing letter to witness.)

The Court: He asked you whether that was your signature. Can you tell the signature?

A. Yes, it is, but how does that involve me?

Q. One moment. I merely asked you if that is your signature.

The Court: Not about the contents. Did you write that name?

The Witness: It is, sir.

Q. And I ask you whether the two statements attached to that refer to checks that were issued by you?

The Court: You can tell us very quickly whether those are your signatures on the checks.

A. I signed the checks, sir, on my account.

Mr. Rogers: I will offer them in evidence. First I will [fol. 923] have them marked for identification.

(Thereupon the check 628-1940 referred to was marked as Defendants' Exhibit D-28 for identification.)

(Thereupon the check 7-12-40 referred to was marked as Defendants' Exhibit D-29 for identification.)

The Court: We will suspend now for five minutes.

(Short recess taken)

[fol. 924] The Court: Is that exhibit marked?

Mr. Rogers: They have been marked for identification. I offer them in evidence.

Mr. Kallis: If the Court please, I object on the ground they have no bearing upon any of the issues in this case. I don't know what the purpose of Mr. Rogers is in offering them. I would like to have him state to the Court why he is offering them.

Mr. Rogers: I would like to have his Honor see it, then I think it would be quite clear to him what the purpose is that he is arguing about. (Handing the exhibit in question to the Court.)

The Court: Well, it is offered for the purpose of showing certain bills. That is competent.

Mr. Rogers: It was also offered for the purpose of showing the general standing and repute of this witness in the moving picture industry and the standing in which he was held in the industry when asking for product.

The Witness: That was not my theatre, sir.

The Court: Just a moment. There is an accumulation of facts.

Mr. Rogers: That is what I am doing, sir, I am accumulating the facts.

[fol. 925] The Court: No, I mean by that the obligations alone, that affects his credit.

Mr. Rogers: It also affects the right of a seller to choose his customer and to choose a customer in good repute as against a customer in bad credit standing, or who does not live up to his obligation.

The Court: It is marked for identification. We will see what develops.

Mr. Rogers:

Q. You say that you acted as a buyer and booker for the Park Theatre, isn't that right?

A. That is right.

Q. And you acted as buyer and booker during the period that Di Pillo ran it, is that right?

A. I did some buying when he first started, but afterwards did not continue to buy.

The Court: You will have to speak louder.

The Witness: I did some buying at the time that was started, but didn't continue buying.

Q. In other words, can you tell approximately when you started buying and when you ceased buying for the Park Theatre?

A. We started buying in August some time, and I don't remember when it terminated, maybe January, February. [fol. 926] Q. You mean you started buying and booking in August of 1939, is that right?

A. We started trying to buy in August.

Q. Not talking about "we," when did you start booking and buying for the Park Theatre?

A. Some time prior to the day he opened. He opened Thanksgiving.

Q. He opened in October, 1939, is that right?

A. That is right.

Q. And he operated until——

A. About three or four months.

Q. During those three or four months that he operated the theatre, did you do buying and booking for the theatre?

A. I did.

Q. Did you charge a booking and buying fee?

A. I did. Do I have to answer that?

Mr. Kallis: I didn't object, Mr. De Toto, so you can answer the question.

The Court: What did you charge for booking?

The Witness: $10 a week.

Q. During that period did you buy and book for any other theatres?

A. Palace Theatre, Clifton Springs.

Q. The Palace Theatre in Syracuse?

A. Clifton Springs.

[fol. 927] Q. You bought and booked there?

A. Yes.

Q. And you managed there as well?

A. Yes.

Q. Did you charge a fee for buying and booking?

A. I was the manager.

Q. Did you charge any fee for buying and booking?

A. I was paid as manager.

Q. You were paid as manager and you did your buying and booking?

A. That is right.

Q. With reference to the Park Theatre, do you recall approximately how much that theatre grosed a week during the operation?

A. I don't. The figures were kept from me.

Q. You never saw any figures, did you?

A. Not to speak of.

Q. The figures were kept from you?

A. They were.

Mr. Rogers: That is all, Sergeant.

Redirect examination.

By Mr. Kallis:

Q. Sergeant De Toto, you testified that in August, 1939, you had some discussions and transactions with some of [fol. 928] film companies with regard to the leasing of films for the Park Theatre, Geneva, and will you please tell the Court when the release of pictures for the current season occurred?

A. After I had contacted the Department of Justice and called it to their attention.

Mr. Rogers: I move to strike. Is the motion to strike granted, may it please the Court?

The Court: Yes.

Q. When did the release occur by the film companies for the current 1939 and 1940 season?

A. I don't recall. It was some time later. Quite some time later. I believe it was August. The date of the contract with United Artists would bring that out.

Q. I am talking about the general release.

The Court: What time in the year?

Mr. Kallis: That is exactly what I have in mind.

Q. When did the 1939 and 1940 season begin?

Mr. Rogers: Begin for what purpose, Mr. Kallis? It begins for a lot of purposes.

Mr. Kallis: For exhibition purposes.

The Witness: It starts in September.

Q. September one year and ends August 31st of the following year. With regard to the 1939-1940 product when did the film companies release those pictures?

[fol. 929] A. It was several months later. I don't know the date of that letter.

Q. I am talking about release throughout the country.

Mr. Rogers: The National release date.

Mr. Kallis: The National release date. Do you know what I mean.

The Witness: The new product.

Mr. Rogers: Let's see if he knows what the National release date means.

Q. Do you know what the National release date is?

A. It is the date a picture is normally released throughout the country.

Q. When did that occur?

A. In September. I just told you that.

Q. In 1939?

A. That is right.

Q. Did you specify in August of 1939, when you talked with these film companies as to what season product you were interested in releasing?

Mr. Rogers: May it please the Court, this is not proper sur-direct examination. He has had three opportunities now to get his main case in.

The Court: What theatre?

Mr. Kallis: Park Theatre in Geneva.

Mr. Rogers: He didn't open until after Thanksgiving, [fol. 930] he said.

Q. You stated you were offered in August, 1939, some 1937-1938 picture and some 1938-1939 pictures, and that you refused to take them and one of the reasons was that the price was too high. Will you please tell the Court what other reasons there were, why you refused to take in August, 1939, pictures for the 1938-1939 season?

Mr. Rogers: As I recall, may it please the Court, he said he couldn't fix the season. He didn't know what season product.

The Court: He is asking him now.

Mr. Rogers: The question is predicated on testimony that is not in the record. It is hypothetical and it must be based on testimony in the record.

The Court: Negotiating for the season. What was it?

Mr. Rogers: May I have the company you have in mind, Mr. Kallis?

Mr. Kallis: All right. We will talk first about Paramount.

The Witness: I was offered older pictures, that is, one or two years old, other than current second-run. We wanted current second-run.

Q. Did you state or discuss which current second-run when you talked with the salesman or the representatives [fol. 931] of the companies?

A. I did.

Mr. Rogers: One moment. You said you were speaking to Paramount. Let's stick to Paramount.

Q. Did you tell the Paramount representative you wanted current second-run?

A. I did.

Q. And you had a talk with representatives of United Artists, did you?

A. I did.

Q. And what did you say with respect to the kind of pictures you wanted?

Mr. Rogers: May it please the Court, I do object to this. This should have been part of his direct-examination.

The Court: I don't know whether——

Mr. Rogers: He is rehashing his whole direct-examination.

The Court: No, it is directed——

Mr. Rogers: Yes, this is all direct. It has all been testified to, your Honor. He has had direct. He has had re-direct and now he is having re-re-direct.

The Court: He secured certain pictures and now he wants to find what pictures they were.

(Last question read.)

[fol. 932] The Witness: We wanted current second-run, thirty or sixty days after Schine Theatres in Geneva.

Mr. Kallis: That is all.

Recross-examination.

By Mr. Rogers:

Q. I understand you have been testifying about Paramount, is that right?

A. I have.

Q. And about your going in there to get product in 1939 of August, or around that time, August or September, 1939, is that right?

A. I have.

Q. And you said the only reason that you refused what they offered you was that it was not current second-run, isn't that right?

A. I ~~didn't refuse~~ all their products. I took the first runs.

Q. Just answer my question. Mr. Kallis just interrogated you, and you told him you wouldn't take that product. You told him you wouldn't because you wanted current second-run. You wanted 1939-1940 season?

A. Wanted current second-run, but I did accept some of the other pictures.

Q. Current second-run would be current second-run for [fol. 933] the season 1939-1940?

A. That is right.

Q. And you say you refused it because it was not current second-run, is that right?

A. I did at the time, but I did pick them up later.

Q. Talking about the time Mr. Kallis is talking about. You said you refused them because they were current second-run?

A. That is right.

Q. As a matter of fact, didn't you say you refused to take what they offered you because you wanted first-run, and didn't you *say* testify because you were looking for first run?

A. No.

Q. Didn't you testify on direct-examination that what you were looking for was first-run?

A. No, current second-run.

Q. Didn't you *say* testify on direct-examination?

A. First-run for Geneva?

Q. Yes.

A. No.

Q. You did not so testify, is that right? Did you tell the Branch Manager in Paramount in August of 1939, you wanted first-run pictures?

A. I didn't see the Branch Manager.

[fol. 934] Q. In Paramount you say you didn't see the Branch Manager in August, 1939?

A. No, I talked with the booker and later the salesman.

Q. You saw the booker and you saw the salesman?

A. That is right.

Q. But you never saw the Manager?

A. I may have later, I don't recall.

Q. Don't you recall telling either the booker and salesman or manager of the Paramount in August of 1939, that what you were looking for in the Park Theatre was first-run Paramount product?

A. No.

Q. You don't remember that, do you?

A. (No answer.)

Mr. Kallis: That is all.

Mr. Rogers: That is all.

[fol. 935] Joseph H. Felter, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live?

A. Norwalk, Ohio.

Q. What is your occupation?

A. Steward boss at the Elk's Club Room at present.

Q. At Norwalk?

A. Yes, sir.

Q. Were you formerly connected with the operation of the Moose Theatre there?

A. Yes.

Q. When was that?

A. 1921 to 1924, my brother and I owned the place.

Q. What did you do in 1924?

A. Sold it to the Moose Club.

Q. The local Moose Lodge?

A. That is right.

Q. And then were you still connected with the theatre?

A. Yes, sir, they hired me to stay there with Mr. Frederick to do the buying and booking for Mr. Frederick.

[fol. 936] The Court: At what time?

By Mr. Wright:

Q. Try to speak more slowly and more loudly, Mr. Felter. That was in 1924?

A. When we sold out, until we sold out.

The Court: From 1924?

The Witness: For 13 years.

Mr. Wright:

Q. That is the period during which you were doing buying and booking after the Moose had bought the theatre?

A. That is right.

Q. Who is Mr. Frederick?

A. He was Secretary of the Moose Club.

Q. Coming down to 1934, was there another theatre opened there?

A. Yes, Mr. Jerry Steel and Bill Sullivan opened up a place there about the 28th day of December, I think, not going to say too definitely, but I think around that time.

Q. December, 1934?

A. That is right.

Q. Were there other theatres then operating besides the Moose and the Forum?

A. Just us two.

Q. Calling your attention to the summer of 1935, were you approached by any representatives of the Schine [fol. 937] Company about a deal for the Moose Theatre?

A. Yes, they tried to lease——

Mr. Rogers: One moment. "Yes" or "No" is the answer.

Mr. Wright:

Q. The answer is yes?

A. Yes.

Q. When was the first time?

A. I would say along in May or June, some time along in there.

Mr. Rogers: Which year?

Q. May or June of 1935?

A. Yes.

Q. Who was it came to see you?

A. Two had came, if my memory serves me right, came over to see Mr. Frederick and Mr. Frederick was over at the Post Office.

Mr. Rogers: One moment.

Q. Just say who came to see you.

Mr. Rogers: I move to strike.

Mr. Wright: It may go out.

Mr. Rogers: Thank you, your Honor.

Q. When did they come to see you?

A. The same day.

Q. Who came to see you?

A. Mr. May and Mr. Lazar.

[fol. 938] Q. Who else was there?

A. Mr. Frederick and myself.

Q. Where was this conversation?

A. In our office.

Q. That was the Moose Theatre Building?

A. That is right.

Q. What was said then?

A. They wanted to lease the theatre.

Q. What did you say?

A. Well, we said we didn't feel like we wanted to give up our theatre.

Q. Was anything more said at that time?

A. At the present time, no, they went away.

Q. Did any one come back to see you later?

A. Yes, Mr. Lazar came back.

Q. When was that?

A. Probably a week or ten days later.

Q. Talk to you?

A. Yes.

Q. Whereabouts?

A. He drove in the side there and he came over to the theatre, in the office.

Q. Was anybody else present?

A. The operator was there when he came in.

Q. Wno was that?

[fol. 939] A. His name was Haas.

Q. Was he there during the conversation?

A. No, I don't believe so. I don't think he stayed during the conversation.

Q. What was said by Mr. Lazar on that occasion?

A. Oh, he said that they felt like they would like to own the theatre, and I told him I didn't think we wanted to lease our theatre.

Q. Was anything else said?

A. No, not at that time.

Q. Did he come and see you again?

A. Yes, he came there maybe three or four times later.

Q. During what month was this?

A. Every ten days or two weeks, period of time he would come back.

Q. During what time?

A. From May on.

Q. June?

A. Yes.

Q. What was said on the next occasion?

A. He still wanted to know whether we wanted to lease our theatre or not, and I told him I didn't think we wanted to lease the theatre.

[fol. 940] Q. What did he say to that?

A. He said, "When you are ready let us know". He didn't say much more about it at the present time.

Q. Then did he come again?

A. Yes, later on.

Q. When was that?

A. Probably a week or ten days.

Mr. Rogers: A week or ten days after when?

The Witness: He made frequent visits there.

The Court: He said May or June several times.

Mr. Rogers: The first time he said was May or June, may it please the Court.

The Court: Shortly after that.

Mr. Rogers: Then he said he came about a week or ten days after that, and then he said thereafter a number of visits every ten days or so thereafter. Now we are lost in a maze. I would like to get some dates there.

The Court: He said several times in three or four months.

Mr. Wright: I didn't hear him state that.

By Mr. Wright:

Q. What period of time did these visits of Mr. Mazar cover?

A. Well, he was there probably, I would say, on frequent visits for a year or so. I wouldn't want to just say what date he came or how often. He would come once in awhile [fol. 941] to see me.

Q. Calling your attention to May and June, did you see him in June?

A. I think I did, yes.

Q. Do you recall the time that the Schines took over the Forum Theatre?

A. They took it over—I think they took it over some time in June.

The Court: Was that the other theatre that was there?
The Witness: Yes, sir.
The Court: The Forum?
The Witness: Yes, sir.

Q. Could it have been July?

A. Yes, he came before he bought the other theatre, he came to see us.

Q. Just give us the conversation the last time he came to see you before he bought the Forum Theatre?

Mr. Rogers: Again, can we get that fixed with some degree of accuracy?
Mr. Wright: June or July.

A. He took the other theatre over in June or July, is that right? I think that is about the date he took it over. I wouldn't want to swear to it. I know he took it over in the spring of the year. Before he bought the other theatre, is that what you want to know?

[fol. 942] Q. Yes, the conversation you had with him.

A. He came in to see me and we were standing in the back of the theatre. I think my operator, Paul Haas was there. We talked about the theatre. I said, "Well, Mr. Lazar, if you give me Fox and another company I think we would stay here the rest of our lives." He said, "I believe you could, but I don't think you are going to get it." That was between me and him. He went in the office. He said, "You had better get in with us. We are a big company. You know what it means if you are not in with us." He

said, "If you lease your theatre Mr. William Selman will walk out of town."

Q. Who is William Selman?

A. Mr. Selman was one of the owners of the other theatre.

Q. The Forum?

A. Yes.

Q. Was anything else said then?

A. No, not at present. He said, "You had better see your men about leasing the theatre." I said, "It is no use. I have taken it up with them and they won't consider leasing the theatre."

Q. Calling your attention to the 1934-1935 season, had you been using the R.K.O. product first run in your theatre?

A. 1934-1935?

Q. Yes.

[fol. 943] A. Yes, I had.

Q. For how long?

A. I was in business there for fifteen years.

Mr. Rogers: I move to strike that as not responsive.

The Court: How long had you had R.K.O.?

The Witness: I had R.K.O. when we were in business ourselves and up to the last two years we had R.K.O.

The Court: 1934 to——

The Witness: I ran R.K.O. in 1934.

Q. 1934-1935?

A. That would be under the 1933-1934 contract.

Q. And you also had it in 1934 and 1935?

A. Would that be on—what would the next contract be?

Q. 1935-1936 was the next one.

A. Yes, I played R.K.O. when the boys were in there.

Mr. Rogers: Let us get this clear. I am very much confused.

The Court: You had R.K.O. you said in the 1933-1934 season and 1934-1935 season, or was it the other way?

Mr. Rogers: Is that right?

The Witness: I don't think so. I don't think it worked that way.

The Court: 1934-1935 and 1935-1936?

The Witness: Schine took over in 1935 and 1936; is that right?

By Mr. Wright:

Q. Schine took over Selman's theatre in 1935 and 1936, as [fol. 944] I understand it.

A. That was a 1935-1936 binder.

Q. You had the R.K.O. product, as I understand it, in 1934-1935; is that right?

A. That is right.

Q. During the spring and summer of 1934-1935 what, if anything, did you do to get R.K.O. for the next season?

A. I went in to see R.K.O.

Mr. Rogers: One moment. You can't say R.K.O. That is a corporation.

Q. Tell us who you saw?

A. I saw Mr. Greenblat, the District Manager.

Mr. Rogers: Who is "we"?

The Witness: Myself and sometimes Mr. Frederick went along with me.

The Court: Greenblat?

The Witness: That is right; the District Manager for R.K.O., the District Manager in Cleveland.

By Mr. Wright:

Q. Whereabouts did you see him?

A. I saw him in his office and made a contract with him.

Q. Where was that?

A. In Cleveland, in the branch office.

Q. About when was it you went in on the 1935-1936 season?

A. I went in very early, trying to get the contract through.

[fol. 945] Q. What did he tell you?

Mr. Rogers: I object to it on the ground that it is not binding. There is no evidence of authority. And on the ground it is a purely local transaction.

The Court: Perhaps you should first show who Mr. Greenblat was, from his experience and knowledge of him.

By Mr. Wright:

Q. Did you know Mr. Greenblat?

A. Yes.

Q. How long had you known him?

A. For four or five years.
Q. During that time you had bought film from him?
A. Yes.
Q. For the Moose Theatre at Norwalk?
A. The Moose Theatre.
Q. From R.K.O., you mean?
A. Yes.
Q. Did you know what position he held there with R.K.O.?
A. He was Branch Manager.
Q. At Cleveland?
A. Yes.
Q. Can you tell us what this conversation you had with him was when you first went in about the 1935-1936 product?

Mr. Rogers: I press the same objection, may it please [fol. 946] the Court.
The Court: Overruled.

Q. Can you fix the date any better than the spring?
A. I should say around July—between July and August 1st I went in to see Mr. Greenblat.
Q. Had you seen him prior to that time?
A. Every time I went in the office booking I asked him if he would sell me a contract.

Mr. Rogers: I move to strike that out as not responsive.
The Court: Strike it out.

Q. When was this you went in there?
A. I went in about every week or ten days.
Q. About what period?
A. I went in in May, June and July.
Q. What did he tell you when you first went in about the 1935-1936 product?

Mr. Rogers: When was that first time?

Q. Can you fix that any more definitely?
A. I will say the first of June I went in to see him.
Q. About the first of June?
A. I will say that.

Mr. Rogers: It is not a question of whether you will say that. Is that it?
The Court: Is that your best recollection of the time?
The Witness: Yes. I didn't pay much attention to it.

[fol. 947] Q. What did he tell you then?

A. He said "We will take a contract and we will send it in" and we sent in a contract. I went in the office later, I will say 15 or 21 days, and he said, "Joe, I am sorry, I don't believe your contract is coming back." He said, "I am sending them a telegram." He sent them a telegram and he came to me——

The Court: What did he say?

The Witness: He said, "Joe, if you insist any more I am going to lose my job." He says, "You cannot get R.K.O."

Q. Did he tell you why you couldn't?

A. He said, yes, Mr. Schine is going to use the product.

Q. Then what product were you able to get for the 1935-1936 season?

A. Well, I got half of Fox. I got Columbia and I got United Artists.

Q. Anything else?

A. That is the small——

Q. On the major companies?

A. No, nothing on the major.

Q. How about Warner?

A. I don't think Warner sold us that year. I think we lost Warner the first year after Schine came in.

Q. Do you remember whether you had the Warner for the [fol. 948] 1935-1936 season?

A. I did not have Warner.

Q. You don't think you did?

A. No, sir.

Q. What is your recollection of what the product was that you had in the 1935-1936 season?

A. We had half of Fox and I had all of Columbia and I had all the United Artists, and I think I had Warner second run.

Q. You are not sure whether you had Warner second run or half of it first run?

A. No, I am not so sure of that.

Q. These other companies you are talking about you had first run; is that right?

A. Yes.

Q. And as to Warner you either had second run or half of first run; is that right?

A. That is right.

[fol. 949] Q. What if anything did you do about getting film product for the 1936-1937 season?

Mr. Rogers: With which company do you mean?

Mr. Wright: I am just asking him generally.

The Witness: Well, I went in to my regular companies and asked them for——

Mr. Rogers: I object to that and move to strike.

Q. What do you mean by your regular companies?

A. I went in to Warners and asked them for a contract.

Mr. Rogers: One moment. Let us get that.

Q. When was that?

A. I played half the first year——

Mr. Rogers: I move to strike as not responsive. We are asking for a date.

The Court: State the time as near as you can that you went in to Warner.

The Witness: 1935 or 1936 I went in to see Warners about their product.

Mr. Rogers: I move to strike. The question is directed to 1936-1937.

Q. The question is what you did about getting Warner pictures for 1936-1937 season.

A. I went in to see Milt Mooney——

Q. When was it you went in to see Milt Mooney?

A. If you want to go back to your 1935-1936, I went in to [fol. 950] Milt Mooney——

Mr. Rogers: That is not responsive to the question.

The Court: Who is that?

The Witness: Milt Mooney.

Q. Who was he?

A. He was the Branch Manager for the Warner Brothers.

Q. Where?

A. In Cleveland.

Q. What was it you wanted to tell me about 1935-1936?

Mr. Rogers: One moment. I object to the form of the question. He might want to tell him a lot of things. Let us have direct questions and answers.

Mr. Wright: We are here to find out what the truth is.

Mr. Rogers: We are here to have you conduct a direct-examination properly.

The Court: You are inquiring about Warner. Was there anything further said in 1935 or 1936 about Warner?

The Witness: I went in to see him about buying the product, and Mr. Milt Mooney told me——

By Mr. Wright:

Q. When was this?

A. I think that was in 1935. It is the 1935 and 1936 product we are talking about; isn't that right?

[fol. 951] Q. When was this you first went in to see him about the 1935 and the 1936 product?

A. I went in to see him after Schine had taken over the theatre.

Q. That was after July of 1935?

A. That is right.

Q. You saw him in Cleveland?

A. Yes.

Q. What was the conversation you had with him then?

A. He said "Joe, I'm afraid you can't get it. I had some trouble with my own houses up in Bellefontaine and I don't think I better make too many deals with you, I don't think you have a chance to buy the product".

Q. Do you remember whether that was the 1935-1936 or 1936-1937 product?

A. That was 1935 and 1936.

Q. Are you sure about that?

A. As close as I can remember now. I wouldn't want to swear to everything.

[fol. 952] Q. May it have been 1936 and 1937?

Mr. Rogers: I think Mr. Wright should stop leading his witness and stop impeaching his witness. If he gets one answer and he doesn't like it he suggests——

Mr. Wright: I want to know what the truth is.

Mr. Rogers: Let us get testimony, but not through you.

The Court: He should testify from his own recollection.

Mr. Wright: I think he is confused about it.

The Court: He said he is sure it was in 1935. Is there anything further you want to say as to the time?

The Witness: What do you want to know, Judge?

The Court: As to the time you went in and saw him.

A. That was for the 1935 and 1936 product.

Q. You went in in 1935?

A. That is right.

Q. What I am getting at is whether or not you are sure that you had any Warner product or not for the 1935-1936 season?

A. The first season I played after Schine came in it is my recollection I played half of Fox, all of Warners—half of Warners—and all of Columbia and all United Artists. That is your first run.

Q. The season you are referring to is 1935 and 1936?

A. 1935 and 1936.

[fol. 953] Q. As I understand it, your best recollection now is that you did have half of Warners for 1935-1936; is that right?

A. I think that is right.

Q. And then I will ask you again what you did about getting Warner for the 1936-1937 season.

A. I went in to see Mr. Mooney, the same man, the District Manager.

Q. When was that?

A. 1936 and 1937. I went in about the middle of July or first of August.

Q. For what year?

A. For 1936 and 1937 product.

Q. What was said then?

A. Mr. Mooney said——

Mr. Rogers: I press the same objection.

The Court: He said he was the Branch Manager. I think we should have more than his conclusion.

Mr. Wright: Mr. Mooney is here in the court room. He will be on the stand.

The Court: We are dealing with this witness now.

By Mr. Wright:

Q. How long had you known Mr. Mooney?

A. Ten years—fifteen.

Q. You had bought films from him for the theatre at Norwalk?

A. That is right.

[fol. 954] Q. You knew what position he held?

A. Yes, sir.

Q. Will you tell us what your conversation with Mr. Mooney was there?

A. I asked him for my half of the product and he said, "You haven't got a chance, Joe." He said, "The Schines have got the house and they are going to use it."

Q. That was with respect to 1936-1937?

A. That is right.

Q. Then did you go to see any one at Columbia about their product for 1936-1937?

A. I went to see Mr. Bissell.

Q. Who is he?

A. He was the branch manager for the Cleveland office.

Q. Columbia?

A. Yes, that is right.

Q. Had you dealt with him before?

Mr. Rogers: What was that date?

Q. Do you remember approximately when you went in to see Mr. Bissell about the 1936-1937 product?

A. Along between the middle of July and the first of August.

Q. How long had you dealt with him?

A. We used Columbia for probably off and on ten or twelve years, I should say. We used it all the time we were in there, all but one year. The other house used it for the [fol. 955] first year, 1934.

Q. You had had them in 1935 and 1936?

A. Yes, and they came to me and volunteered—wanted me to buy them from them.

Q. You bought them for 1935 and 1936?

A. Yes, sir.

Q. This conversation you had in 1936 was about 1936-1937?

A. Yes.

Q. What was said then?

Mr. Rogers: The same objection, may it please the Court.

The Court: Overruled.

A. He said that Schine has taken the house over and you haven't got a chance to get the pictures. He said, "You had better hurry if you want second runs." I said I wasn't interested.

Q. Did you get any of the Columbia pictures then for 1936 and 1937?

A. Not a picture.

Q. With respect to United Artists, did you try to buy that for 1936 and 1937?

A. I went over to see their branch manager. I think his name was Mr. Goodman, if I am not mistaken.

Q. Whereabouts?

A. At the branch office in Cleveland.

Q. When?

[fol. 956] A. About the same time, July to August 1st.

Q. You had dealt with him before, had you?

A. Yes, I had used their product right along.

Q. You had had it for the 1935-1936 season?

A. Yes.

Q. What did he tell you about using the product for the 1936-1937 season?

A. He said, "We will see you later on. Come in in a couple of weeks and I will talk to you." I said, "All right, Mr. Goodman." I went in in a couple of weeks. He said, "I have got kind of a deal on with Mr. Schine and I will let you know later." I went back in about two weeks to see him about booking pictures and he said, "Joe, I am sorry, but you can't have a picture."

Q. Then what did you do about Fox, if anything, for the 1936-1937 season?

A. I went in to see Mr. Fox——

Mr. Rogers: Who?

A. Mr. Schmertz, the branch manager of the office.

Q. He was the branch manager where?

A. Cleveland, the Cleveland office.

Q. You had dealt with him before, had you?

A. Yes, we had always used his product for 12 or 14 years, 12 years, 15 years, I guess.

Q. What was the conversation you had with Mr. Schmertz?

[fol. 957] A. Mr. Schmertz said, "Joe"——

Mr. Rogers: One moment. I object to it on the ground that there is no proper evidence of authority. I object on the ground that it is a purely local transaction, and on the ground that it is not binding on the defendants.

The Court: Had you contracted before through Schmertz for Fox?

The Witness: Yes, sir.

The Court: How many years?

The Witness: Well, I played him all the time.

The Court: A number of years?

The Witness: Yes, 10 or 12 years, as long as we were there we always played his product.

The Court: Dealt with him directly?

The Witness: Yes, right in the office. They would send their salesman out and——

By Mr. Wright:

Q. What was the conversation you had with Mr. Schmertz in the summer of 1936 about the 1936-1937 product?

Mr. Rogers: I press the same objection.

The Court: He asked you about your dealings with Schmertz directly and you replied something about a salesman. I want to know what direct contact you had had with Schmertz in securing Fox.

[fol. 958] A. We always went into the office, as a rule, and bought our pictures. They send a salesman out.

The Court: You had dealt with Schmertz in the office in the prior years?

The Witness: Yes, sir.

The Court: Objection overruled.

By Mr. Wright:

Q. Can you tell us what Schmertz said to you on that occasion?

A. Yes, he said, "I never turn down any of my customers. You can have half of my product."

Q. You were playing half of the 1935-1936 product; is that right?

A. Yes.

[fol. 959] Q. Then what else was said?

A. Well, it went along and I went over and couldn't buy any other pictures then.

Mr. Rogers: I move to strike that.

The Court: Strike it out.

Q. Just finish the conversation you had with Schmertz.

A. He said "You can have half and here is the price." He said "Here is your price for your pictures."

The Court: Just tell what you said.

The Witness: That is what I am saying. He said "Here is your contract," and he said "I will give you 15 days to make up your mind whether you want the contract or not."

Q. What did you say?

A. I said I would let him know.

Q. Is that all the conversation then?

A. That is all the conversation we had.

Q. Did you see him or talk to him again?

A. Yes, a few days later I called him up and I says, are they still open for me, Mr. Schmertz?" He said "Yes." He said "I will give you three days to make up your mind whether you want them or not."

Q. What did you say?

A. After the third day I called him up. He said "Well, Joe, I couldn't wait any longer, they are sold to Schine."

[fol. 960] Q. Is that all the conversation you had?

A. That is all the conversation we had.

Q. Were you able to get any product at all first-run for the Moose Theatre for the 1936-1937 season?

A. No.

Q. Then what, if any, efforts did you make to get second-run?

A. I went over and bought Warner second-run.

Q. Whom did you make that deal with?

A. Mr. Mooney, the Branch Manager in Cleveland.

Q. Then what did you do?

A. Then I went over to Metro-Goldwyn-Mayer.

Q. When was this?

A. Along about the first of July or the first of August—the 15th of July or 1st of August.

Q. 1936?

A. 1936. For 1936 and 1937.

Q. Whom did you see at Metro-Goldwyn?

A. I seen Mr. Frank Drew, the Branch Manager at the Cleveland office.

Q. Had you dealt with him before?

A. Yes, always used their product except one year.

Q. You knew he was the Branch Manager?

A. That is right.

Q. What was the conversation you had with him?

[fol. 961] A. He said "We will pick you out a bunch of second-run pictures, take the contract and send it in."

Q. And you signed an application?

A. I did.

Q. And sent it in?

A. And sent it in. And it went along so long——

Q. Just a minute. When was the next time you saw him or talked to him?

A. I was in there probably we will say in 10 or 12 days. He said "I haven't heard nothing from the contract yet."

Q. Who said that?

A. Mr. Drew.

Q. What did you say?

A. I said "I am anxious to get the contract." And he said "I will do everything I can in my power to get it for you if I can."

Q. Well, did you see him again?

A. Yes, I went in, we will say ten days or two weeks later.

Q. Then what did he say?

A. He said "Joe, I am afraid you are not going to get it." He said "It is too long, I don't think you are going to get the second-run, I don't think they are going to sell second-run at all."

Q. Did he say why?

A. He just said "Well, they don't want to establish a [fol. 962] second-run policy.

Q. Then what did you do?

A. Then I made up my mind the best thing we could do as we couldn't get any produet was to sell to Schine.

Mr. Rogers: I move to strike all that.

The Court: Yes, strike it out.

Q. What if anything did you do with reference to then getting in touch with any representative of Schine?

A. Well, I took it up first with the Lodge and told them I couldn't——

Mr. Rogers: I move to strike.

The Court: Yes.

The Witness: I got in touch with Mr. Lazar and told him I guess they had made up their mind to sell the house.

Q. Do you remember when that was?

A. I couldn't say offhanded. It would be pretty hard to remember all these dates.

Q. Can you pick the approximate month?

A. I would say along in August some time.

Q. Of what year?

A. 1936.

Q. And then was the deal made?

A. No, the deal was not made in a few weeks. He came down—Mr. Lazar came down there and asked what we [fol. 963] wanted for the theatre, and I told him we wanted $17,500.

Q. Was the theatre sold?

A. The theatre was sold afterwards then for $15,000.

[fol. 964] Q. When was that?

A. Well, that was along in October, wasn't it, we sold the theatre, Mr. Schine? I wouldn't want to say off-handed.

Q. What is your best recollection?

A. Along in October.

Q. October, 1936?

A. Yes.

Q. Then what did you do?

The Court: You said you sold it to whom?

The Witness: To the Schine Theatre. Corporation. I continued to work for him.

Q. In what capacity?

A. Well, I was manager at the time when they took the theatre over and he told me I could stay right there.

Q. As manager of the Forum?

A. The Moose Theatre.

Mr. Rogers: Do you mean the Forum or the Moose?

The Witness: The Moose.

Mr. Wright: That is my mistake.

Q. How long did you continue working for them?

A. I worked for them until they took it over. I think they took it over in October some time. I worked with them until the first of the year.

Q. Then you left?

A. I quit working there. They closed it down.

[fol. 965] Q. Just tell what happened, in the Moose Theatre, after they took it over.

A. I worked with them until after the first of the year and they closed it down then, shortly afterwards, to two days a week. Then they had the manager from the other office come down and he would have me scrubbing the walls down to the cellar to knock out cobwebs that I couldn't see any use for.

Mr. Rogers: I move to strike that.

The Court: Strike that out.

Q. In any event, you resigned?

A. I resigned, yes.

Q. Do you know whether or not the Moose Theatre was later closed?

A. It was closed to two days a week.

Q. I say, do you know whether or not later on it was closed entirely?

A. Yes, it is closed now.

Q. Do you remember when it was closed?

A. No, I wouldn't want to say off-handed.

Q. What happened with respect to admission prices at the Moose Theatre after it was turned over to Schine?

A. Instead of charging—it went from 15 to 20 cents.

Q. You had been charging what?

A. 15 cents.

[fol. 966] Q. For what? That is the evening adult admission price?

A. That is right.

Q. Then what was the change that was made when Schine took over?

A. It went to 20 cents at the Moose.

Q. What, if any, change occurred at the Forum with respect to admission prices?

A. They charged 15 and 30 cents—15 cents in the afternoon and 30 cents in the evening. After they took the Moose over they went then to 25 and 35 in the evening, except Saturdays, Sundays and holidays they charged 35 cents straight through.

Q. That last answer referred to prices at the Forum?

A. That is right.

Q. Then do you recall what admission prices were being charged there during the year 1940 in Norwalk?

A. Well, I think they charged 44 cents. They did charge 44 cents.

Q. At which house?

A. At their new house.

Q. Had they then built another theatre?

A. Yes, they have got another theatre there now.

Q. That was built in 1940?

A. No, I don't believe it was that long. I believe they built it about two years ago, two or three years ago. I won't [fol. 967] swear to it.

Q. What I wanted to cover was the year 1940. At that time the Moose was closed, was it?

A. In 1940 they closed the Moose? No, I believe they ran it Saturdays and Sundays, two days a week.

Q. They were running the Moose Saturdays and Sundays?

A. I think they were, yes.

Q. And operating the Forum full time?

A. Yes, that is right.

Q. Do you remember what the admission prices were then?

A. I don't recall.

Mr. Rogers: Is this for the year 1940, Mr. Wright?

The Court: Do you mean——

The Witness: They raised the admission price then to 25 cents at the Moose.

The Court: It was 40 cents in 1940, he said.

The Witness: That was the Forum Theatre.

Q. 40 cents at the Forum?

A. And 25 cents at the Moose.

Mr. Rogers: Is this 1940 you are talking about?

Mr. Wright: 1940. You may cross-examine.

The Court: We will suspend now until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 968] After Recess, 2 P. M.

Appearances: Same as before noted.

Joseph H. Felter resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Cross-examination.

By Mr. Rogers:

Q. Mr. Felter, my understanding was that you operated the Moose Theatre yourself from 1921 to 1924?

A. Me and my brother.

Q. That is, you and your brother?

A. That is right.

Q. The testimony was you operated it yourself. At that time and during that period did you have that theatre under lease?

A. No, we owned the building.

Q. That is, you and your brother actually owned the property?

A. That is right.

Q. How many seats did the Moose Theatre have?

A. Approximately 850.

Q. Do you remember when that house was originally built?

A. 1904.

Q. In 1921 was there any other theatre, motion picture [fol. 969] theatre, in Norwalk?

A. Yes, the Linwood.

Q. Other than the Moose Theatre and the Linwood Theatre were there any other moving picture theatres in Norwalk from 1921 to 1924?

A. No.

Q. In 1921 who was operating the Linwood Theatre?

A. Wesley Price.

Q. Did he continue operating that theatre from 1921 to 1924?

A. I don't believe he did. I think he sold out to a fellow by the name of Stall about two years after we came there.

Q. You mean in about 1923?

A. I would judge so.

Q. He sold that theatre out to a man by the name of Stall?

A. That is right.

Q. Did Stall then operate the theatre?

A. He operated the theatre for—I wouldn't want to say—I would say three or four years, I should judge.

Q. In other words, he operated it until 1925 or 1926?

A. I presume along there somewhere.

Q. What happened after Stall ceased operating the theatre?

A. He sold out to the Moose Club and went over and bought out Bellevue and died over in Bellevue. His name was—I can't just recall the name. He went over and bought the two Bellevue houses.

[fol. 970] Q. Was that bought out after you started working or had been working as buyer and booker by the Moose?

A. Yes, sir.

Q. Prior to the time you became buyer and booker for the Moose did you sell that Moose property to the Moose Lodge?

A. Yes, sir.

Q. So that about 1926 or, rather, after Moose bought this property in 1926, who then operated the Linwood Theatre?

A. We did.

Q. You did—you mean you and Mr. Frederick?

A. Yes.

Q. You were then operating both the Moose Theatre and the Linwood?

A. That is correct.

Q. At the time that the Moose was operating the Moose and the Linwood Theatres with you and Mr. Frederick carrying on the operations, was there any other theatre in Norwalk?

A. No, sir.

Q. When for the first time was there any theatre built in Norwalk after the Moose had the operating of both the Moose and the Linwood?

A. We closed the Linwood, I should judge, around—about 1931 I think we closed the Linwood out.

Q. Your best recollection is that you bought the Linwood around about 1926?

[fol. 971] A. Around there somewhere, yes.

Q. How long did you actually continue operating that house?

A. Probably four or five years; somewhere around there. Six years.

Q. After you got the Linwood were you operating the Linwood every day or only part of the week?

A. We operated it for a while every day and then we cut it down to two days and three days a week.

Q. Which were the two days or three days a week?

A. Well, we probably run like Thursday, Friday, and then we would run Saturday and Sunday together.

Q. Then what is your best recollection as to when you closed the Linwood down entirely?

A. I would say around 1931, maybe 1932. After business got pretty tough there we closed it up.

Q. In either 1931 or 1932 you then shut down the Linwood; is that right?

A. Yes, sir.

Q. And at that time the Moose was the only theatre operating in Norwalk?

A. That is correct.

Q. And that condition continued up to the time that the Forum Theatre was built?

A. That is correct.

Q. As I recall, you claimed that you had R. K. O. product [fol. 972] for the season 1934-1935; is that right?

A. We didn't play R. K. O. in 1935. We bought it for 1934 and 1935.

Q. I mean the season of 1934, you bought the season's product of 1934-1935?

A. That is correct.

Q. I want to go back to the Linwood for a moment. When you made the deal to acquire the Linwood Theatre who actually carried on the negotiations to acquire that theatre?

A. Do you mean who bought it?

Q. No, who carried on the negotiations, I mean.

A. I made the deal myself.

Q. You carried on the negotiations?

A. Yes, the first deal was with Mr. Stall, and then we had to go to Moose Haven to get permission from the Lodge to take it over.

Q. You first made the deal with Mr. Stall?

A. That is right.

Q. Then you had to go back to the Lodge and get authority from the Lodge to consummate the deal for the property?

A. We went to Angora, Illinois. That is where they had their home.

Q. When, to the best of your recollection, was it that the Forum Theatre opened?

A. Around and about the 28th day of December, 1934.

[fol. 973] Q. By that time the first run product had already been sold by the major companies for the 1934-1935 season, hadn't it?

A. No, they were about, I would say, three months getting it ready.

Q. Three months getting what ready?

A. The theatre.

Q. I am not talking about the theatre now. I am talking about the major producers.

A. They were not sold yet, the first run.

Q. They were not sold yet? Which companies of the major companies were not sold by December of 1934?

A. They bought——.

Q. No, I say, which ones were not sold for the 1934-1935 season?

A. I don't think there was any sold when they came in there. We just started to buy them.

Q. You mean you first started buying the 1934-1935 product in December of 1934?

A. No, they were——

Q. I knew you didn't mean that. I wanted to get that straightened out.

A. They were about three months getting the theatre ready.

Mr. Rogers: I move to strike that. I assume that is stricken, may it please the Court? It is not responsive to my question.

[fol. 974] The Court: I think it is clear what he means by it.

Mr. Rogers: My question was whether or not the first run product had been sold by the major companies and he said these people took three or four months to get the Forum Theatre ready. That is not responsive to my question.

The Court: Very well, strike it out.

Q. What I want to get is: When did you start buying the 1934-1935 season product from the major companies?

A. I didn't buy them very early when we were in the town alone because we always waited until they had them pretty well played up.

Q. That is very interesting, but I want to get the date.

A. It would be pretty hard to tell the correct date. I will give you a little illustration.

Q. No, don't give an illustration. Just answer questions and we will get along quicker. Did you go in in the spring of 1934?

A. No, we went in the fall, around September.

Q. What product did you buy at that time for the 1934-1935 season?

A. I bought half of Warners', half of Fox, all R.K.O., and Universal and United Artists.

Q. Well, did you try to buy Paramount?

A. No, we weren't playing Paramount.

[fol. 975] Q. You weren't playing Paramount?

A. No, sir, we were not.

Q. Did you try to buy it?

A. No, sir, I did not.

Q. Did you try to buy M. G. M.?

A. Yes.

Q. When did you try to buy M. G. M.?

A. Along about probably the latter part of September.

Q. Is that the first time you tried to buy M. G. M.?

A. I talked to them before and they said when they were ready they would let me know. Their salesman came and called on us.

Q. You tried to buy M. G. M.?

A. Yes, I did.

Q. Prior to the 1934-1935 season had you played the M. G. M. product in the Moose Theatre?

A. I did.

Q. When?

A. Up to 1934 and 1935.

Q. You mean you had played M. G. M.?

A. Yes.

Q. Full product?

A. Yes.

Q. At the Moose Theatre?

A. Yes.

[fol. 976] Q. Up to and including the season of 1934-1935?

A. That is right.

Q. When did you, for the first time, get word of the fact that the Forum Theatre was going to be built?

A. Well, the day I went in to buy Metro Bill Sullivan was sitting in the office and——

Q. When was that? Do you remember the date?

A. He probably could tell you the date better than I could. Along some time the latter part of September or the last of August. Bill Sullivan was sitting in the office, because I remember he came in and shook hands.

Q. Did you know at that time——

A. No, I didn't know it at that time.

Q. Do you mean to tell me you didn't know at the end of September that the Forum Theatre was to be built?

A. No, I am telling you the day I went in—I wouldn't say what day it was. It was along in the fall of the year. Bill Sullivan was in the office, and their salesman, Mr. Brauer, called on me and he said, "Joe, do your want to buy M. G. M.?" And I said "Yes.", and he had the price.

[fol. 977] Q. All I want to know is a simple answer whether it is your testimony that you did not know by the end of September of 1934 that the Forum Theatre——

A. I wouldn't say what date it was, along in September some time, wouldn't say what date it was because I don't remember.

Q. One moment. Hold on now. And at that time when you went in there to buy this product 1934-'35 product, the Schine people were not in the town yet, were they?

A. No, they weren't.

Q. When, to your knowledge, did you notice work being done to build the Forum Theatre?

A. First knowledge I got I called up——

Q. No, no, I am asking when, to your knowledge, did you know that actual work was being done in building the Forum Theatre?

A. I say three months previous to the day they opened up. Thanksgiving Day, I think, they came out with their——

Q. You mean Thanksgiving Day is when they started to build the Theatre?

A. That is when they made the big splurge around there. I don't remember.

Q. How long was the construction work——

A. I would say——

Q. No, no. How long was the construction work carried [fol. 978] on in the building of the Forum Theatre?

A. A little better than three months.

Q. When did it start, do you know?

A. Figure back three months from the 28th day of December, make it——

Q. That would make it September, wouldn't it?

A. That is right.

Q. Did I understand you to say that at Thanksgiving Day they started to open the theatre?

A. No, they started to remodel it.

Q. You mean they didn't start to remodel it until Thanksgiving Day?

A. They were delayed or something about their lease.

Q. After the Forum Theatre was built, didn't you go to Mr. Selman and tell Mr. Selman that you wished to buy the Forum Theatre?

A. Yes, sir.

Q. About when was that?

A. Oh, I would say maybe three or four months, after it was opened?

Q. Was it earlier than that? Was it about two or three weeks after the theatre was opened?

A. No, about three or four months.

Q. Do you remember what Mr. Selman told you at that time?

A. Yes, sir. I can tell you what he said.

[fol. 979] Q. What did he say?

A. That they would sell the theatre to us.

Q. In other words, Selman said he was prepared to sell the theatre to you?

A. That is correct.

Q. What price?

A. $4,000 cash, and the balance to be assumed on the obligation.

Q. What price?

A. $28,000.

Q. Did you buy the theatre?

A. We did not.

Q. Did you tell him why you didn't buy the theatre?

A. No, didn't tell him why.

Q. You just didn't buy?

A. I can tell you why.

Q. You didn't tell him why you didn't buy the theatre?

A. No.

Q. Later did you go to Mr. Selman and offer to sell the Moose Theatre?

A. No, sir.

Mr. Wright: This is all improper cross-examination. If he wants to go into it with Mr. Felter as his own witness, all right, but certainly it is beyond the scope of the direct.

[fol. 980] Mr. Rogers: I think your Honor will rule upon that when that becomes necessary. It isn't necessary at this time.

Mr. Wright: Well, the objection is made that it is improper cross.

The Court: Overruled.

Q. Is that so, Mr. Felter?

A. That is right.

Q. Did you ever have any talk with Mr. Selman or Mr. Steel in which there was a discussion about selling the Moose Theatre to them?

A. No, we didn't. They came and tried to buy the theatre

from us. They didn't want to buy it. They wanted a lease.

Q. They came to you, you say?

A. Mr. Steel came. I don't know whether Bill Selman came or not. I knew Steel came to my house.

Q. There was some talk with Steel, Selman or both about a deal on the Moose Theatre?

A. If I understand it right Mr. Steel wanted to buy Selman's interest, and he wanted to go with me and keep those theatres.

Q. Wasn't it the other way around that Selman wanted to buy Steel's interest?

A. No, I don't remember that, no.

Q. Don't you remember Selman did buy Steel's interest?

[fol. 981] A. No, I didn't know anything about that. I thought he sold his interest to Schine.

Q. Didn't you know he made a deal with Selman to sell his interest to Selman?

A. No, I did not.

Q. You knew nothing about that?

A. No.

Q. I understand it to be your testimony that with reference to the 1936-1937 product you went to Warner's and asked for that product and you saw Mr. Mooney and he said, "You haven't got a chance", is that right?

A. That is correct.

Q. Was that his language, "You haven't got a chance?".

A. Well, he just said——

Q. Was that his language?

A. I wouldn't say he just put it that way. He said, "There is no chance for you to buy them, Joe. You can't get them."

Q. When you were asked on your direct-examination, you said, "You haven't got a chance."

A. If I said that that must be true.

Q. That must be true?

A. Yes, sir.

Q. Then you said you went to Columbia and you saw Mr. Bissell?

[fol. 982] A. Bissell.

Q. And you asked him about 1936-'37 product and you said he also said, "You haven't got a chance." He said that, too?

A. Yes.

Q. He used the identical words Mr. Mooney used. Is that right?

A. That is what they said to me.

Q. You are sure of that now?

A. Yes, sir.

Q. Who else told you that, "You haven't got a chance"?

A. I don't remember anybody else.

Q. Nobody else?

A. Outside of I went over to United Artists and they said "We tried to make a deal with Schine. If they don't, come back in a week or two and we will see."

Q. Did he say "You haven't got a chance"?

A. No, he said, "Come back and we will let you know."

Q. I wanted to ask you if anybody else said that in that same language, "You haven't got a chance"?

A. No.

Q. All right?

A. Correct.

Q. You said that when you finally made your deal with Mr. Lazar in August, 1936, to sell the Moose Theatre to [fol. 983] Schines, that the purchase price was $15,000?

A. That is correct.

Q. Is that right?

A. That is right.

Q. As a matter of fact, wasn't the purchase price $17,500?

A. I don't know. That is what we were supposed to get, but we didn't get it. We got $15,000.

Q. As a matter of fact, when the deal was made, didn't you provide that the price was to be $17,500, and that you were to get a commission?

A. Yes, sir.

Q. One moment. Let me finish the question. And you were to get a commission of $2,500 to be paid by the purchaser?

A. No, sir, I did.

Q. Did you get a commission?

A. Yes.

Q. Of $2,500?

A. Mr. May told me——

Q. Did you get a commission of $2,500?

A. No, I did not.

Q. One moment. You just said you did.

Mr. Wright: You characterized it as a commission. Just ask him what he got.

The Court: I didn't understand him to say he got a com-
[fol. 984] mission of $2,500. He said he got a commission.

Q. You did say you got a commission?

A. No. I didn't say I got a commission, no, sir. I said I didn't get any commission. When you ask the question let me answer it in the proper way.

Q. Maybe you don't like the way I put the question either.

The Court: Don't argue with the witness.

Q. I directed a question to you and his Honor and I both understood you to say, "Yes," you did get a commission on that.

The Court: What is the fact?

The Witness: The Moose gave me an option of $17,500, and they told me I was entitled to get a vacation and if I get $2,500, I was to give the girl half. We worked for thirteen years without a vacation, and after I went up and got $1250 a piece. I did not get any commission. They said I was to get it for my vacation.

Q. Who gave it to you?

A. Mr. Lazar. And the Moose said I was entitled to a vacation, and they said to take the option for $17,500, and I asked Mr. Lazar for $17,500.

Q. When was it you were supposed to take this vacation?

A. I was to get the—any time I wanted to take it.

Q. As soon as the deal was closed?

[fol. 985] A. No, any time I wanted to take it after the deal was made, and the girl got half and I got half.

Q. You said you were to get $1250 to take a vacation?

A. Yes. No, but the Moose——

Q. One moment, and you said you were going to take a vacation before you started to work for Schine, and they were going to give you $1250 for a vacation?

A. The deal——

Q. Just answer the question, is that right?

A. No. I worked for 13 years——

Q. You don't think that is right now?

A. No.

Q. Wasn't part of the deal that you made that you were to get a job with Schine?

A. Yes, sir.

Q. And how much a week were you to get for that job?

A. Well, I was getting $50 a week, and they said if I

stayed there, they would give me more money and the girl, both.

Q. Which girl are you talking about?

A. The ticket girl. The ticket girl, she was there ahead of me. She was there 18 years.

Q. Where is the ticket girl you say you gave $1250?

A. —— give it to her. She got it out of the office —— never touched her money.

[fol. 986] Q. You made a deal under which $1250 was to go to you and $1250 to go to the ticket girl. Is that your testimony?

A. No, the testimony is I called him up afterwards. I said "Is our money up there for a vacation?" And he said, "Yes", and I went up and took it.

Q. You called him up when?

A. After the deal was made.

Q. You said the deal was made and the deal was completed?

A. Yes, sir.

The Court: For how much? Completed for $15,000, you mean?

The Witness: Yes.

Q. When had you spoken about the $2500?

A. I had the option.

Q. When had you spoken about $2500 to anybody in the Schine organization?

A. Nothing was ever spoken. He just said, "If we sell the theatre, Joe, we will give you and the girl money for your vacation," but there was nothing mentioned in the deal.

Q. One moment. Don't argue. In other words, you had a talk with Mr. Lazar, is that it, before the deal was made?

A. No, I don't think he ever mentioned much about it.

Q. Whom did you have that talk with before the deal was made?

[fol. 987] A. Mr. May told me first and Mr. Lazar, and I called him up after it was done and he said, "Yes."

Q. I am asking you a simple question. You said you spoke to May and spoke with Mr. Lazar before the deal was made?

A. Yes.

Q. At that time you were told they would give you $2500 to be split half to you and half to the girl to take a vacation?

A. Yes, but the deal was made.
Q. Is that right?
A. I wouldn't say it was right or wouldn't say it was wrong. I don't remember all of the conversation we went through there.
Q. You actually got $1250?
A. Yes.
Q. And the girl actually got $1250, is that right?
A. Yes. Can I ask you one question?
Q. When this session is over, I will let you ask a few out in the hall. Who gave you that $1250?
A. Up in Cleveland, some attorney.
Q. You traveled then up to Cleveland, did you?
A. That is right.
Q. Did you take the young lady along with you?
A. Yes, sir.
[fol. 988] Q. And you went to this attorney?
A. That is right, sir.
Q. And this attorney gave you $1250?
A. Gave me a check.
Q. Gave you a check for how much?
A. Yes.
[fol. 989] Q. He issued a check to you?
A. Yes.
Q. Are you sure about that now?
A. I think he did. I wouldn't swear to it, but I know he gave me $1250 on a Cleveland bank.
Q. Your best recollection is that he gave you a check?
A. That is what is in my mind. I wouldn't swear to it.
Q. Were you present when the young lady got her $1250?
A. She was right ahead of me. She got it before I did.
Q. In the same room?
A. I think so.
Q. From the same attorney?
A. Yes, sir.
Q. Did she get a check too?
A. She must have if I got a check.
Q. Do you remember whether she got a check?
A. I think she got a check.
Q. To your best recollection, she got a check and you got a check for $1250?
A. Yes, sir.
Q. That was Schine's money; it was not Moose money?
A. Not Moose money.

Q. Schine's money?

A. I don't know if it was.

Q. Prior to the time the deal was made between Schine [fol. 990] and the Moose to buy this property, which deal you testified was consummated just now, weren't they negotiating with you and Mr. Frederick to try and get a lease on that property instead of buying the property?

A. They had been trying to lease it for quite awhile, yes.

Q. And you carried on those negotiations with them, didn't you?

A. We talked to them, certainly.

Q. When you say "we" who do you mean, you and Mr. Frederick or you alone?

A. Me and Mr. Frederick.

Q. Both of you?

A. That is right.

Q. Didn't you tell them that if the lease deal went through you would expect a commission of $4,000?

A. No, I did not.

Q. You mean there was no such talk at all?

A. Not with me they didn't, No, sir.

Q. There was never such a talk, you say?

A. No, sir.

Q. Well, regardless of whether the commission was to be $4,000 or more or less than $4,000, when you negotiated with the Schine people on the basis of them getting a lease on that Moose property didn't you say to them that if the lease went through you wanted a commission paid to you? [fol. 991] A. No, sir.

Q. Didn't you state to them that if the deal went through you would expect a payment of some kind?

A. No, sir, I did not.

Q. And that you say was never discussed?

A. Never discussed.

Q. No payment of any kind to you?

A. I was just to have a job. That is all that ever was asked.

Q. You mean all you asked for was a job if the lease deal went through?

A. That is right.

Q. But never any compensation of any kind?

A. No.

Q. And no payment of any kind?

A. Not that I remember; no payment of any kind.

Q. Is that the best you remember, I mean?

A. That is right.

Q. As I understand your testimony, you said that prior to the time that the Forum Theatre was built the prices of admission in the Moose were ten cents and fifteen cents; is that right?

A. Yes.

Q. And that price of ten cents was for children; is that [fol. 992] right?

A. Yes, that is right.

Q. And fifteen cents for adults?

A. Yes, sir.

Q. Did that apply to every day in the week?

A. I think so.

Q. No difference at all on Saturdays and Sundays?

A. Not as I remember, no.

Q. Don't you remember when you got a really good picture in the theatre you would raise that price to 25 cents?

A. I don't believe we did.

Q. You don't think you ever did?

A. Not at that time. No, I don't believe so. I wouldn't want to say off-handed because that is quite awhile ago.

Q. You wouldn't want to say that off-hand, would you?

A. No, I wouldn't want to commit myself to anything I don't know.

Q. Well, let me take you back only to the year 1934 and see if you can remember about that year. Isn't it a fact that when you played a good picture at the Moose during that year your admission prices were higher than ten and fifteen cents?

A. We had some good pictures.

Q. You had very good pictures. My question is when you had those very good pictures didn't you increase your [fol. 993] price of admission?

A. I don't think we increased. We had one established price. I think it was 15 cents for Friday and the rest of the week it was 15 and 25 probably.

Q. Let us get that straightened out. What were your prices in 1934?

A. That is what I say, I wouldn't want to say off-handed any more.

Q. You testified very definitely when you were interrogated by Mr. Wright that all through your operation there

at the Moose it was ten cents and fifteen cents. Now do you want to change that?

Mr. Wright: All he testified to was the admission prices during the period that he was in competition with Schine.

Mr. Rogers: No, indeed, that is not my understanding.

Q. I will just stick to 1934, that one year.

A. Schine wasn't in that year.

Q. I know Schine wasn't there. What were your prices in 1934?

A. I wouldn't want to say off-handed. I am just telling you when Schine was in in 1935.

Q. Weren't you charging as high as 25 and 35 cents in 1934 when you got good pictures?

A. I think we were charging 25. I wouldn't want to say.

[fol. 994] Q. Were you charging as much as 30 cents?

A. I wouldn't want to commit myself.

Q. Do you remember after Schine came into the town what your prices were in the month of September, 1935?

A. I couldn't say off-handed.

Q. As a matter of fact, weren't you charging 20 cents for the balcony and 25 cents for the main floor before 7 o'clock at night?

A. That may be true. If it is there it must be true.

Q. And weren't you charging 30 cents after 7 o'clock at night and 20 cents for the balcony?

A. That is in 1935?

Q. That is in September of 1935. Is that right?

A. It must be true if it is there.

Q. And didn't you also have so-called bargain nights?

A. No, sir.

Q. Never had them?

A. Not a bargain night, no.

Q. Never had them?

A. No.

Q. When you charged ten cents to all, as a bargain night?

A. I thought you meant bank night.

Q. I said bargain night.

A. Yes, we had some, yes.

Q. And on those bargain nights you charged only ten cents

[fol. 995] to everybody; is that right?

A. Correct.

Q. And that was after Schine came into the town; is that right?

A. I wouldn't say that, no.

Q. Well, I just asked you if that took place in September of 1935 and you said yes.

A. Well, if it is there it must be true.

Q. Now, you said that you never ran—you just volunteered a statement that you never ran a bank night at the Moose Theatre; is that right?

A. I didn't call it bank. I called it prosperity.

Q. You called it Prosperity Night, is that it?

A. That is it.

Q. It was run the same as bank night, wasn't it?

A. I suppose it is the same money-getter.

Q. In other words, the house would put up a pot and you would draw a lucky number and the winner of the lucky number would get the pot?

A. Got a new suit of clothes.

Q. Oh, a new suit of clothes? Then instead of giving money away——

A. No, we gave money.

Q. You also gave prizes away on those nights?

A. No, we didn't give any prizes.

[fol. 996] Q. What did you mean by saying a suit of clothes?

A. I was just kidding.

Q. Let us forget that. How big would the pot be?

A. We never let it go much over $100. If it went over $100 we would split it up.

Q. How much would it run, from $25 to $100?

A. That is right.

Q. So that the lucky winner in any one night would get $25, $50, $75 or $100; is that right?

A. That is right.

Q. After the Forum opened and you had made some efforts to try and buy the Forum didn't you and Mr. Frederick openly declare that you would drive that crowd in the Forum out of town and out of business?

A. No.

Q. Did you ever declare to people in the town of Norwalk after the Forum was opened that you would drive those people out of town?

A. Not that I ever remember nobody ever said anything like that.

Q. I am talking about you.

A. Not me, no.

Q. Do you remember Frederick saying it?

A. No, I don't.

Q. Well, do you remember after the Forum Theatre [fol. 997] opened Mr. Frederick, whom you testified was Secretary of the Moose Lodge——

A. That is correct.

Q. Do you remember him sending a circular letter to the members of the Moose Lodge requesting them not to patronize the Forum Theatre?

A. No, I do not.

Q. You never saw a letter of that kind?

A. No, sir, I did not.

Q. Didn't you and Mr. Frederick plan a letter of that kind to be sent to the members of the Moose Lodge?

A. We did not.

Mr. Wright: If the Court please, I think there ought to be some limits of relevancy here. We are now in a field that it seems to me has no possible connection with the issues that we are trying.

Mr. Rogers: The shoe is now on the other foot. You are trying to show that one fellow is a bad fellow and when we show the other fellow is a bad fellow you don't like it.

Mr. Wright: The other people are not on trial.

Mr. McKay: Mark this for identification.

(Thereupon the newspaper advertisement of Wednesday, September 25, referred to, was marked as Defendants' Exhibit D-30 for identification.)

[fol. 998] Q. Do you remember in the month of June, 1935, speaking to Mr. Brant, a salesman of Warners, about product?

A. Brant?

Q. Brant. Did you know Brant?

A. Surely I k[illegible] him.

Q. You knew him to be a saleman of Warners, didn't you?

A. That is correct.

Q. He was a salesman in the month of June, 1935, for Warner, wasn't he?

A. I suppose if you have it there. I wouldn't want to say. It is pretty hard to keep track of all of them.

Q. You do remember that Mr. Brant was a salesman for Warner, don't you?

A. Surely.

Q. Do you remember him calling on you in June of 1935 to talk product with you? Do you remember him talking to you about making a new deal with you for Warners' product and you saying to him that you didn't want to talk to him about any deal with Warner for that year?

A. No, I don't remember that?

Q. You don't remember that?

A. No, sir.

Q. Do you remember in the month of June in 1935, the early part of June, this same Mr. Brant calling on you to speak to you about product for Warner?

[fol. 999] A. No, sir.

Q. You don't?

A. No, sir.

Q. Don't you remember at that time him suggesting to you giving you a split of the Warner product in July of 1935?

A. I do not.

Q. What?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. Do you remember you saying to him that you were going to tell him confidentially, but not to be repeated, that the Moose Lodge were considering at that time taking over the Forum Treatre?

A. No, I do not.

Q. And do you remember telling him that until the Board meeting was held of the Moose you couldn't make up your mind as to whether you would buy or not?

A. I do not.

Q. You don't remember that, do you?

A. No, sir.

The Court: As I had his testimony he testified he had half the Warner for 1935 and 1936. Is that right?

Mr. Rogers: Yes.

Q. Do you remember Mr. Brant having a further talk [fol. 1000] with you on July 12, 1935, about Warner product?

A. No, I do not.

Q. You don't remember?

A. No.

Q. And do you remember telling Mr. Brant at that time

that there were no developments on the Moose Lodge taking over the Forum Theatre?

A. I do not.

Q. Do you remember at any time around that period discussing with Mr. Brant the fact that the Moose Lodge proposed to take over the Forum Theatre?

A. I do not remember.

Q. You don't remember saying that to him?

A. No, sir.

Q. Or discussing that with him?

A. No, sir, I do not.

Q. Is it your testimony that you don't remember or that it didn't happen?

A. No, I don't remember. I wouldn't want to say it didn't happen because I don't remember.

Q. In other words, you might have said that to him, but you don't remember it now?

A. I don't remember it now is right.

Q. Well, do you remember July 15, 1935, finally making a deal with Mr. Brant under which it was agreed that you [fol. 1001] were to get one-half of the Warner product?

A. I suppose if it is there I must have made the deal. I played half the product.

Q. Don't you remember having made the deal with Brant?

A. It would be hard to say. Most generally when we made the deal we had to go in the office anyway and sign up with the branch manager.

Q. Don't you know that you made the deal in Norwalk with Brant?

A. They always came in my office. If I made the deal it certainly must have been made in Norwalk.

Q. You say if you did make the deal. Don't you remember you did make the deal and you did get half the product?

A. Surely I made the deal.

Q. Do you know a man by the name of Mr. Lichter?

A. Yes, a salesman for Fox.

Q. Do you remember Mr. Lichter seeing you and Mr. Frederick in Norwalk on or about July 3, 1935?

A. Well, he called upon us quite frequently, yes.

Q. About that time, didn't he? Well, do you remember Mr. Frederick being present at a talk with you?

A. No, sir, I couldn't remember.

Q. You don't remember that? I mean it is possible that you and Frederick and Lichter had a talk?

A. It is possible. It is pretty hard to remember. He was [fol. 1002] in and out so much that it is pretty hard to say.

Q. Didn't you tell Lichter at that time that you couldn't do anything about talking about getting service at that time?

A. I don't remember that.

Q. Because it looked as though you were going to take over the Forum Theatre?

A. No, sir, I don't remember that. No, sir, I do not.

Q. Do you remember discussing with Mr. Lichter the fact that you were planning to take over the Forum Theatre at that time in July of 1935?

A. I do not. He probably talked about it. I don't remember it though. I won't say he didn't.

Q. I am not asking you whether he talked about it. I am asking you whether you talked about it.

A. No, not as I remember, not as I can recall.

Q. You don't recall that at all?

A. No.

Q. Don't you remember yourself telling him or Frederick telling him that the deal was practically closed on the Forum and that the only thing that stood in the way of the deal closing on the Forum was the rent?

The Court: Dealing with this witness, you mean?

Mr. Rogers: Yes.

A. I don't remember.

[fol. 1003] Q. Who is Charlie?

A. Charlie Frederick, the Postmaster.

Q. Frederick's name is Charlie?

A. That is right.

Q. If Mr. Lichter says that you and Charlie told him that the deal was about to be closed on the Forum and that the only thing that remained in the way was the question of rent would you say that Lichter was mistaken?

A. No, I wouldn't say that because he might have went over to the post office and talked to Mr. Frederick over there.

Q. You mean he might have talked to Frederick and Frederick might have told it to him, might have talked about taking over the Forum?

A. That may be true.

Q. And you wouldn't do anything about product until you had the Forum deal closed?

A. I wouldn't say that because he sometimes stopped in to see Frederick at the time, because Frederick was Postmaster at the time, United States Postmaster there.

Q. Who is Jerry?

A. Jerry Steel.

Q. Do you remember you saying to Lichter that he was not to tell Jerry (meaning Jerry Steel) anything about——

A. No.

[fol. 1004] Q. One moment. Let me finish. —anything about the impending deal on the Forum because Jerry Steel wanted it to be kept quiet?

A. No, sir, I do not.

Q. Do you remember you telling him not to tell Jerry Steel anything about it?

A. I do not remember that.

Q. Would you say that wasn't so?

A. No, I wouldn't say it wasn't so, but I don't remember saying it.

Q. Do you remember having a talk with the same Mr. Lichter we have been speaking of about the 20th Century-Fox at the latter part of June of 1935?

A. He stopped in there pretty nearly every Friday night.

Q. I mean you probably had a talk with him at that time?

A. I probably had a talk. I wouldn't say I didn't.

Q. And the Forum Theatre was operating at that time, wasn't it?

A. Yes.

Q. Do you remember telling Lichter that you objected to 20th Century-Fox selling any repeat pictures to the Forum Theatre?

A. No, I did not.

Q. Do you mean that isn't so or you don't remember?

A. I don't think that is so. I bought some second run——

[fol. 1005] Q. No, all I am asking is whether you told that to Lichter?

A. No, I didn't tell him that.

Q. You are definite about that?

A. I am certain I wouldn't say nothing about that.

Q. You are sure of that?

A. Yes.

Mr. Rogers: Now I should like to introduce in evidence as Defendants' Exhibit——

Mr. Wright: Don't you think you had better have somebody beside Mr. McKay identify it first before you introduce it? I do not know what it is yet, other than that you have marked it as an exhibit.

Mr. Rogers: It is an advertisement of the Moose Theatre.

Mr. Wright: Ask him about it. If it is his ad, let it appear.

The Court: Counsel objected to similar offers on the ground that it was not proved.

By Mr. Rogers:

Q. Do you recognize that as an ad of the Moose Theatre when you were operating it (showing to witness)?

A. Surely.

Mr. Rogers: Then I offer it in evidence.

By Mr. Wright:

Q. When was this run? Do you know the date?

A. No, I can't tell the date. There is no date on here.

[fol. 1006] Mr. Rogers: Yes, you have the date on there.

The Witness: What year was it?

By Mr. Rogers:

Q. Don't you know by the product that is on it?

A. No, there are a lot of Joe E. Brown's. That is "Bright Lights". What year was it? It might be second run.

Q. Here is "Dynamite".

A. This is a second run picture.

Q. Do you know the date?

A. It is September 25. That is a second run picture.

Q. Assuming it is a second or a third run picture, what year did you run those pictures?

A. Probably in 1934 and 1935.

Mr. Wright: Do you know when the ad was run?

The Witness: No, I couldn't tell you.

By Mr. Rogers:

Q. You say it is either 1934 or 1935?

A. It might be 1936. I wouldn't say off-handed.

Q. It is either 1934, 1935 or 1936?

A. It wouldn't be 1934.

Q. It may be in 1935?

A. No, I don't want to say.

Q. Which year would you say it would be?

A. I wouldn't want to say.

Q. You wouldn't want to say?

[fol. 1007] A. No, that is one thing I won't do.

Q. In other words, you don't remember dates, do you?

A. It is pretty hard to remember dates on all these pictures.

Q. You don't remember them at all, do you?

A. Just as good as the rest of it.

Q. I show you this picture and I ask you is that signature at the bottom of that the signature of Mr. Frederick (showing to witness)?

A. That is Mr. C. O. Frederick, Secretary.

Q. He is the same Mr. Frederick who is Secretary of the Moose Lodge?

A. That is correct.

Q. And who co-jointly with you operated the Moose Theatre?

A. Correct.

Mr. Rogers: I offer it in evidence.

Mr. Wright: I have no objection. My reading of it is that this is the 1935-1936 season. Does that agree with the other gentlemen?

Mr. Rogers: Yes.

Mr. Wright: We have no objection.

(Thereupon the Warner Bros. and First National production schedules referred to were received in evidence and marked as Defendants' Exhibit D-31.)

Mr. Rogers: That is all.

[fol. 1008] Redirect examination.

By Mr. Wright:

Q. With reference to these admission prices, Mr. Felter, as I understand, on cross-examination you testified that in September, 1934, there you had an admission price of about 25 cents; is that right?

A. We had a scaling price. On the first of the week—on Friday and Saturday we had a bargain bill for a bargain price.

Q. At that time you were running first run major product; is that right?

A. The first five days, and after that we had to run second run.

Q. In 1934—I am talking about the year 1934.

A. We run what we call slough pictures.

Q. In the fall of 1934?

A. Yes.

Q. You were running first-run pictures?

A. Surely, we had first run, but the pictures were not a drawing power.

Q. What pictures do you mean didn't have drawing power?

A. Like we had some Universal, and so on, we would pick out the best ones for the first of the week and Westerns, and so on, on Friday and Saturday.

The Court: You mean there was a different price during [fol. 1009] the week?

The Witness: Yes.

Q. 25 cents was the maximum?

A. Yes, sir.

By Mr. Wright:

Q. You charged 25 cents for the best pictures and less for the slough?

A. That is right.

Q. As I understood your testimony on direct examination just before Schine took over the Moose, and that was in——

A. 1935.

Q. —October, 1936, wasn't it, the Moose?

A. Yes, they took the Moose over in 1936.

[fol. 1010] Q. Prior to that time the Moose was then charging 15 cents for adults' admission prices, is that right?

A. Yes.

Q. Just before Schine took over this Moose Theatre, as I understand it, your testimony on direct examination was that you had then been charging admission prices of 10 cents and 15 cents, is that right?

A. I think that is right.

Q. How long had you been charging 15 cent prices before that?

A. Before that? Well, in 1934 we got 25 for the first five days and 15.

Q. How about 1935?

A. I think we charged for the first five days in 1935——

Q. When was it you dropped to 15 cents straight price?

A. When we couldn't get any more products.

Q. When was that?

Mr. Rogers: Pardon me. There is no evidence at any time he could not get any product.

The Court: Yes, strike it out. When was it you dropped to 10 and 15 cents?

The Witness: Fall of 1936.

Mr. Wright:

Q. What was the reason for that?

A. Well, I wasn't able to get any first-run pictures. I [fol. 1011] had to play second-run pictures.

Q. With reference to this sale that was made of your theatre to Schine, as I understand it, $15,000 was paid to the Moose Lodge, is that right?

A. That is right.

Q. And $1250 was paid to you?

A. That is right.

Q. And $1250 was paid to the ticket girl?

A. Yes.

Q. What was her name?

A. Clara Cook.

Q. Those payments were made by whom?

Mr. Rogers: He has testified to that.

Mr. Wright. He said some attorney in Cleveland. I just wanted to get it straight.

The Witness: Yes, it was through Mr. Lazar. He told me to go down and get—the man said the deal was made.

Q. Mr. Lazar was the one who sent you to the attorney to get the money so the total amount then paid by Schine was $17,500, is that right?

A. That is right. That is what the Moose wanted to get in the first place.

Q. Going back to the time you sold the theatre to the Moose, do you remember what the price was then in 1924? [fol. 1012] A. $21,500.

Q. That is what the Moose paid you and your brother?

A. That is right.

Q. Do you know what investments they had made in the

theatre between that time and the time it was sold to Schine?

A. The Moose put in $40,000.

Mr. Rogers: I object to that as immaterial.

The Court: Overruled. How much?

The Witness: The Moose put in $40,000 after they took it over. Approximately $40,000 after they bought it.

Q. A total investment of the Moose was somewhat better than $60,000?

A. Better than $60,000.

The Court: Did the Moose know of your arrangement to get $1250?

The Witness: Mr. Frederick told me to go and get it.

By Mr. Wright:

Q. I think on your cross-examination you were asked first what you had for 1934-1935, and I think you mentioned R.K.O. or Universal, United Artists, Warner and Fox, and then the next question was asked you about M.G.M., and Mr. Rogers asked you if you had M.G.M. including 1934-'35, and I think you said "Yes", is that correct.

A. 1934 and '35?

[fol. 1013] Q. Yes.

A. No, I did not have them.

Q. You did not have them for that year?

A. I did not have them for that year. I don't think Mr. Rogers asked that question.

Mr. Rogers: I did, Mr. Wright. You are correct.

The Witness: But I did not have them.

By Mr. Wright:

Q. The fact is what you did have for 1934-'35 was Warner, Fox, R.K.O., Universal, United Artists, is that correct?

A. That is right. They had Columbia, Paramount and Metro. Those three companies they did.

Q. When you say "they" you are referring to the Forum Theatre under the operation of Steel and Selman, is that right?

A. That is correct.

Mr. Wright: I think that is all.

Recross-examination.

By Mr. Rogers:

Q. Mr. Felter, you said the Moose put $40,000 into this theatre?

A. Approximately, around $40,000.

Q. What did they put it in?

A. Well, they put in new seats.

[fol. 1014] Q. When was that done?

A. Well, after they bought the house.

Q. How long after they bought the house?

A. I would say five years.

Q. They operated five years?

A. Maybe six years, I wouldn't state.

Q. Five or six years?

A. Yes.

Q. And then put new seats in, is that it?

A. Yes, sir.

Q. Do you remember what year that was the seats were put in?

A. No, I couldn't tell you.

Q. About what year?

A. I couldn't say. They put them in after they took it over. They ran the theatre 13 years. Maybe seven years after they had the house. You can date it back and you will have it pretty close.

Q. They reseated the house?

A. Downstairs and took them from downstairs and put them upstairs.

Q. You mean all they did was they took the seats from downstairs and put them upstairs?

A. And bought new seats for downstairs.

Q. How many seats?

[fol. 1015] A. 484 seats.

Q. Do you know who they bought them from?

A. Yes, from the American Seat Company.

Q. Do you know what they cost?

A. Yes, sir, they cost $7.40 a seat, I think. I wouldn't swear to that, around $7.40 a seat.

Q. And about 400 seats?

A. 484 seats.

Q. What else did they do?

A. All right, they redecorated the whole house.

Q. Painted it?

A. Redecorated, all hand-painted work.

Q. Do you know what that cost?

A. I don't know. They had it done by the Radcliff people.

Q. I am asking you what it cost?

A. No, but they had it done by the Radcliff people.

Q. You said offhand to Mr. Wright that it cost them $40,000.

A. I don't know. Mr. Frederick paid for some of them bills.

Q. You don't know much about it?

A. Yes, I do.

Q. Do you know about the whole $40,000?

A. Pretty close, when we get all summed up.

Q. You don't know anything about the redecorations?

A. I told you it was hand-painted and they put in the lights.

[fol. 1016] Q. How much did it cost?

A. Well, I would say $4,000, offhand.

Q. Did you let that contract for the painting and decorating and changing the lights?

A. No, I was there.

Q. Did you let the contract?

A. No.

Q. Did you pay the bills?

A. No.

Q. Did you let the contract for the seats?

A. I was right there.

Q. Did you let the contract for the seats?

A. No.

Q. Did you pay the bill for the seats?

A. No, I did not.

Q. You say you were present when Mr. Frederick made the deal for the redecoration?

A. That is right.

Q. You participated in making the contract with him for the redecoration, is that right?

A. That is correct.

Q. And what did you say was the price in that contract for that?

A. I would say around $4,000 for that.

Q. A few minutes ago you said you did not know.

[fol. 1017] A. I said around approximately $4,000. I wouldn't say right to the dollar.

Q. Under four or over four?

A. I couldn't say.

Q. Would it be just as accurate to say it was approximately $3,000?

A. No, it was better than $3,000, because they had three or four bidding on it.

Q. Do you remember the bids?

A. One of them bid $9,000, I know, and Mr. Frederick just laughed. I knew it was around three or four thousand dollars, I would say four thousand dollars would catch it pretty close.

Q. Three thousand dollars?

A. I said four thousand dollars.

Q. Which is right, three or four?

A. About four thousand dollars.

Q. When did they do the painting and decorating?

A. They done that around—they took it over in 1924. I would say in 1929 or '30.

Q. What did they do next?

A. They put in three new furnaces.

Q. What did those three new furnaces cost?

A. I would say around $1,000.

Q. A thousand dollars for the three?

[fol. 1018] A. I would say approximately three.

Q. Did you make that contract?

A. No, sir.

Q. Did you pay for it?

A. No, sir. The secretary pays all bills in any lodge.

Q. I am asking, did you?

A. I am just telling you, so you will understand.

Q. You did not make the contract?

A. No.

Q. Where did you get the one thousand dollar figure from?

A. Mr. Frederick said it cost about $1,000.

Q. Mr. Frederick said it cost about $1,000, and that is all you know about it?

A. No, I was sitting there when they made the deal. I sometimes made the deal and Frederick paid the bill.

Q. Which is an accurate statement, what Frederick told you he paid, $1,000, or were you there when the deal was made?

A. I was there when the deal was made.

Q. He did not tell you anything about it?

A. We always talked it over.

Q. You said a few moments ago Frederick told you it was $1,000?

A. You know——

Q. I don't know anything. You know.

[fol. 1019] A. I might see it.

Q. I don't know anything. I am asking you, were you there and did you see that $1,000 figure put in a contract?

A. No, I did not.

Q. That is all I want to know. Coming on to the next piece of work done on the building. These furnaces, when were they put in?

A. Around 1930 or '31.

Q. What was the next thing they done?

A. The next thing they done, they painted, fixed up the marquees. They hollered about the marquees out in front.

Q. You mean that canopy in front of the theatre?

A. Yes.

Q. They wanted the marquees. Do you know how much they paid for that? Do you know?

A. No, I don't.

Q. Let us go on to the next item.

A. The marquees was pulling. They had to have them all changed.

Q. You repaired the marquees?

A. Yes.

Q. How much did they cost, do you know?

A. I wouldn't want to say.

Q. Then do you know?

[fol. 1020] A. No.

Q. You don't know about that. What is the next item?

A. The next item. Let's see what they did do next. An organ.

Q. They bought an organ. Did you make that contract?

A. Yes, sir. I went along and helped make it.

Q. How much did that cost?

A. $5,750, besides having it installed.

Q. When did they put that organ in, do you say?

A. I would say around about 1927 or '28.

Q. Either 1927 or 1928. What else did they do?

A. They had to pay for installing the organ.

Q. Do you know what that cost?

A. No.

Q. You don't know?

A. No.

Q. What is the next item?

A. The next item is they concreted all the dressing rooms downstairs.

Q. Did you make a contract for that?

A. No, I did not.

Q. Do you know what it cost?

A. No.

Q. You don't know. Go to the next item. The next item was that they put in a cooling system.

[fol. 1021] Q. What kind of a cooling system was it?

A. It cost——

Q. Whose cooling system?

A. Right here bought in Cleveland, it was bought from the Theatre National Supply House.

Q. The National Theatre Equipment Company?

A. That is correct.

Q. Was that just a cooling system, or an air-conditioning plant?

A. That is right, the kind what you call an air-conditioning plant.

Q. What?

A. It cost approximately around $1,000, because I was there and helped to make the deal.

Q. Cost about $1,000?

A. Yes.

Q. What next?

A. Let's see what they did have next. Well, they done a lot of other little things.

Q. Loose odds and ends?

A. Sound machine, sound equipment, put in a talking machine.

Q. What do you mean they put in sound equipment?

A. When sound came in.

Q. 1928?

A. I paid $5,750 for it.

[fol. 1022] Q. You mean 1928 you put in sound equipment?

A. Is that when talkies first came out?

A. That is about it.

Q. We had one the year before and took it out. I put in R.C.A. and paid $5,750 for it.

Q. Did you make the deal?

A. Yes.

Q. Was that paid on the installment plan?

A. Yes.

Q. Paid out of the box office?

A. I don't know if it was paid out of the box office, paid as he went along, paid down $1,000, if I am not mistaken.

Q. Paid the balance from the box office receipts?

A. Paid from the theatre.

Q. Did you do the same thing with the organ?

A. No, we did not. We paid that cash. I bought a high condenser arc.

Q. A high condenser arc.

A. Yes. I think I paid $1,000 for that, if I am not mistaken.

Q. About when was that?

A. 1929 or '30.

Q. Did you make the deal for that?

A. Yes, I did.

Q. You paid $1,000 for a high condenser arc in 1929 or '30?

[fol. 1023] A. Yes, and bought that from Oliver Theatre Supply.

Q. Bought that from Oliver?

A. Yes.

Q. That is about all, is it?

A. Well, we changed our machines, traded out machines.

Q. You traded some machines in. Did you make the deal, trading the machines in?

A. I was there. We made them together.

Q. With whom did you make the deal?

A. I think we made it with the National Theatre Supply.

Q. The National Theatre Supply. Do you remember what——

A. No, I don't remember what the price was.

Q. And that's all, is it?

A. Well, there's one thousand other things.

Q. You mean repair jobs as you went along?

A. No, spent a lot of money in that theatre.

Q. Does this sum up what you put in the theatre?

A. That is some of it, but there's a lot of other things. We put in the drapes.

Q. Which drapes?

A. When we redecorated the theatre, cost me $900.

Q. Where are the drapes?

A. In the theatre.

Q. Where?

A. At the back end and over the boxes, cost about $900.

[fol. 1024] Q. Whom did you get the drapes from?

A. Radcliff people, Toledo.

Q. Did you make that deal yourself for the drapes?

A. No, I didn't.

Q. Who made that deal?

A. Frederick and I both made the deal.

Q. You know $900 was the price?

A. Approximately $900, maybe they took off 2 per cent.

Q. In other words, might been been six or seven hundred dollars, is that right?

A. No. Frederick said it was going to run around $1,000.

Q. Frederick told you that?

A. No, I was sitting there.

Q. You were sitting there and he had to tell you what the price was?

A. No, some one would come in or go out.

Q. Was that organ still in the house when you sold the theatre?

A. Yes, it was.

Q. Was the sound equipment in the house as you put in in 1928 when you sold the theatre?

A. Yes, sir, in good shape, too.

Q. And you hadn't done any redecoration of that house since 1929-'30, had you?

A. Oh, yes, we done some.

[fol. 1025] Q. You did a little paint work here and there, is that it?

A. No, we spent a lots of money.

Q. You didn't redecorate the house, did you?

A. No, not the whole house.

Q. Here and there you did a little paint work?

A. Re-curtained it.

Q. Decorations?

A. Yes, a little paint.

Q. Did you ever put a set of drapes in after the first set of drapes you are talking about?

A. No.

The Court: That is all.

Mr. Rogers: That is all.

MILTON H. BREYER, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Clagett:

Q. Will you state your name and residence?

A. Milton H. Breyer, Bucyrus, Ohio.

Q. Mr. Breyer, how long have you been identified with the motion picture industry?

[fol. 1026] A. 29 years.

Q. Did you take over and commence to operate the State Theatre in Bucyrus, Ohio, about June, 1934?

A. I did.

Q. Will you state what the theatre situation was at that time at Bucyrus?

A. There were two small theatres there and one uncompleted theatre building.

Q. The theatre you acquired was the State?

A. Yes, sir.

Q. What was the other theatre?

A. The Southern Theater.

Q. Who was operating the Southern?

A. The Corporation name I think was Bucyrus Theatres, and Phil Charnas was manager.

Q. You said it was an uncompleted theatre building?

A. Yes, sir.

Q. Mr. Breyer, can you tell the Court what product, what major first-run product, you used for the 1934-'35 season?

A. Yes, sir, Metro-Goldwyn, Warner Brothers, R.K.O., and Universal.

Q. Will you state, if you know, what major product was used in the Southern Theatre?

A. Fox.

[fol. 1027] Mr. Rogers: Do you mean for the same season, Mr. Clagett?

Mr. Clagett: For the 1934-1935 season.

The Witness: Fox and Paramount and Columbia, United Artists. He had four products and we had four products.

Q. Calling your attention to the 1935-1936 season, will you state whether you attempted to negotiate a contract with Loew's for its product for that season?

A. I did.

Q. Will you state with whom you had any negotiations or conversations concerning the product of that company for that season?

A. With both the salesmen and Frank Drew, the Cleveland Branch Manager.

Q. Had you known Mr. Drew as the Branch Manager of Loew at Cleveland?

A. I did.

Q. Had you had previous contact and dealings with him?

A. Yes, sir.

Q. Will you please state what was said in your conversation with Mr. Drew and will you state the date of that conversation?

Mr. Rogers: I object to the question on the ground there is no proper foundation laid for the admission of this tes-
[fol. 1028] timony, no testimony to what kind of dealings this witness had with Mr. Drew, and on the ground it is purely a local situation, on the ground it is not binding on us.

The Court: I think it should be shown what his connection with Drew had been preceding this time.

Q. Your previous dealings with Mr. Drew had been in connection with the purchase of film?

Mr. Rogers: Mr. Clagett, please don't get into bad habits.

The Court: The question is leading.

Mr. Rogers: Ask him a question, will you please?

Q. What previous dealings had you had with Mr. Drew, Mr. Breyer?

The Court: During what period of time?

The Witness: When I bought the theater in 1934 they were running Metro products, and I took over the current contract which was for 1933-'34 product, and naturally I had dealings with him, being a customer of M.G.M.

Mr. Rogers: I move to strike out all that follows "naturally".

The Court: Yes. He is asking now about your dealings with Drew.

Q. You were stating you had dealing with Mr. Drew.

[fol. 1029] Mr. Rogers: When?

The Witness: State your question again. I just don't understand what you mean. What are you driving at?

The Court: What business had you done with Drew personally? That is what he is trying to get at, prior to this time?

The Witness: Prior to what year?

Q. Prior to the 1935-1936 season.

A. Well, in 1934, I naturally was a customer of Loew's, so I had dealings with him, and prior to that, I dealt with him a number of years when I was an exhibitor in Akron, Ohio.

The Court: Mr. Drew himself, you got pictures through him. We are trying to show here what Drew's business is, the connection with the company. Something must be shown.

Mr. Wright: Drew has already been identified as Branch Manager of Metro in Cleveland by other witnesses.

The Court: What were your dealings with him?

The Witness: The usual procedure.

The Court: Just answer my question. What had you done with Drew about getting pictures in person?

The Witness: Why, I buy through the salesman and the [fol. 1030] manager, and that would be my dealings with him on any pictures I wished to purchase.

The Court: Applied through whom?

The Witness: Through the salesman and Drew.

The Court: In prior years?

The Witness: Yes.

The Court: How many years?

The Witness: I was in Akron in 1920, and I think Drew was in Cleveland at that time. I am not sure, but all the years he was with M.G.M. I did business with him.

The Court: As a representative of this company?

The Witness: Of the M.G.M.

The Court: Go ahead.

Mr. Rogers: I press the objection on all grounds stated.

The Court: Overruled.

Q. Mr. Breyer, what conversation did you have with Mr. Drew with respect to purchasing that product, the product of the Loew Company for the 1935-'36 season, and when did you have a conversation with him?

A. As I recall I talked to him some time during the summer with respect to making a deal for the 1935-'36 product.

Mr. Rogers: Summer of which year?

The Witness: 1935 is when I talked to him, in the summer of 1935.

[fol. 1031] Q. What was stated in that conversation?

A. He told me——

Mr. Rogers: What did you ask him for, isn't that better?

The Court: Go ahead. The question is perfectly proper. What was said?

The Witness: He said he didn't think he could give me a deal for all of the pictures for that season, but he thought that such a split deal could be worked out, that means 50 per cent of the pictures.

Mr. Wright: Did you make a deal for any pictures at that time?

The Witness: No, sir.

Q. Did you have any further negotiations with any representative of Loew's in connection with the purchase of pictures for the 1935-'36 season?

A. I did.

Q. Who was that?

A. Mr. Rogers, General Sales Manager of M. G. M.

Q. Where?

A. In New York City.

Mr. Rogers: When was that?

Q. Can you fix the date?

A. I believe it was the middle of August in 1935.

Q. Will you state your conversation with Mr. Rogers?

[fol. 1032] A. I told him that I was interested in continuing as an account of M. G. M., and I wanted to buy the pictures for the coming season. He told me in view of the fact that the new theatre was bought and was going to be completed that he thought the fairest deal for that town would be to make up a split deal with the following terms: I was to receive all of the current releases up to the first of the year, and then after that I would get my proportionate share of the pictures, until I had received 50 per cent of the product released during that particular season.

Q. Did you later negotiate such a deal?

A. I did.

Q. Where did that happen?

A. That deal was made with Frank Drew in Cleveland.

Q. I show you a contract with Metro-Goldyn-Mayer, dated September 4, 1935, and ask you if that is your signature?

A. That is my signature.

Q. And was the deal, which was made at that time?

A. That is the deal.

Q. And I also show you a rider between yourself and Metro-Goldwyn-Mayer dated September 4th, and ask you if that was attached to that deal?

A. It was. It is part of the deal.

[fol. 1033] Mr. Clagett: Will you mark that for identification?

(Thereupon the two papers referred to were marked as Plaintiff's Exhibit P-61 for identification.)

Mr. Clagett: I am going to offer it.

Mr. Rogers: My objection, may it please the Court, is it is not binding on us and relates to a purely local transaction.

The Court: Overruled.

Mr. Clagett: We offer Plaintiff's Exhibit P-61, consisting of two papers that are marked for identification as the next Plaintiff's exhibit.

(The two papers, previously marked as Plaintiff's Exhibit P-61 for identification, were received in evidence.)

Mr. Rogers: Will you note my objection and the Court's ruling, please?

Mr. Clagett:

Q. Mr. Breyer, with respect to the 1935-'36 season, did you attempt to negotiate a contract for first-run Warner's product?

A. I did.

Q. Will you please state with whom you had any negotia-
[fol. 1034] tions or conversations concerning that product?

A. With both the salesman and Mr. Mooney, the Branch Manager.

Q. You had known Mr. Mooney as Branch Manager for Warner's?

A. Yes, sir.

Q. Will you please state your conversation with Mr. Mooney and when?

Mr. Rogers: Objected to on the ground that there has no proper foundation been laid, no evidence as to the authority of Mr. Mooney, on the ground it is not binding on the defendants.

The Court: I think it appears from the prior testimony Mr. Mooney represented Warner's.

Mr. Rogers: I am reserving my objection, if the Court please.

The Court: Objection overruled. What did he say? You talked to Mr. Mooney, what did he say?

Mr. McKay: Can we have the date fixed?

The Witness: When I talked to Mr. Mooney?

Mr. Rogers: Yes.

The Witness: I can't say exactly. It was during the buying season, and I think it was some time during the middle of the summer, it may have been July or August.

By Mr. Clagett:

Q. What was said?

[fol. 1035] A. I told him I wanted to make a deal, and we sat down and worked out figures and I signed an application. It was sent to the home office.

Q. Did you ever hear anything from that application?

A. It never was returned approved.

Q. Did you ever get Warner's product for the 1935-'36 season?

A. I did not.

Q. Will you state please, whether you had any contact with a representative of the Schine Company relative to buying?

Mr. Rogers: One moment. Let us get his conversation, and no leading questions, please. I object to the question as being leading.

The Court: Will you read the question?

(Last question read.)

The Court: Buying what?

Mr. Clagett:

Q. Your theatre.

Mr. Rogers: That was my objection.

The Court: State who you had the conversation with, state the individual. Did you have a talk with somebody about buying your theatre?

The Witness: I did.

The Court: And when was that?

[fol. 1036] The Witness: Some time during the summer of 1935.

The Court: With whom?

The Witness: With Mr. Lazar, a representative of the Schine Company.

The Court: Lazar. All right.

[fol. 1037] Q. When did Mr. Lazar meet you?

A. I can't recall the exact date. He came out to the house. I know it was in the summer. I happened to be in the back yard.

Q. What was said?

A. Well, he approached me——

Mr. Rogers: One moment. I move to strike "he approached me."

The Court: That is a conclusion. Let him state what was said.

A. He asked me if I would be interested in selling the theatre to the Schine Company. He also stated that they had bought the property of the unfinished theatre and they were going to complete it and make a beautiful theatre out of it, and then he proceeded to tell me that the Schine Company was expanding very rapidly and needed manpower and he thought a man like me, with the experience I had had, would go a long ways if I would join the company, and he invited me if we made the deal to join the company.

Q. Did you make a deal with Schine?

A. Eventually, yes.

Q. And did you also accept a contract of employment for Schine?

A. I did.

Q. Did you continue to manage the State Theatre?

A. For Schines, yes, sir.

[fol. 1038] Q. When the new theatre was opened did you manage that theatre?

A. I did.

Q. What was the name of the new theatre?

A. The Bucyrus Theatre.

The Court: There were three theatres there then?

The Witness: Yes, sir.

The Court: I don't know whether you stated—perhaps you did—did you sell the State to Schine?

The Witness: I sold the State to Schine.

Mr. Rogers: He says then he took a job at the State and

when they finished the Bucyrus he took the job of managing the Bucyrus.

By Mr. Clagett:

Q. What was the date of the sale of the State Theatre to Schine?

A. The Schines took over the operation on approximately the 29th of September, 1935.

The Court: You sold in September, you say?

The Witness: Yes, the deal was made in September.

The Court: 1935?

The Witness: 1935.

The Court: We will take a short recess.

(Short recess taken.)

[fol. 1039] By Mr. Clagett: We are offering a Warner contract with the Belpik Corporation, approved July 25, 1935, for the 1935-1936 season, as Plaintiff's Exhibit P-62.

(Thereupon the Warner contract with Belpik Corporation, for 1935-1936 season, referred to, was received in evidence and marked Plaintiff's Exhibit P-62.)

Mr. Clagett: And the next Government Exhibit P-63, being a letter bearing the initials of J. E. F. to J. Meyer Schine, bearing date of August 23, 1935.

(Thereupon the letter, bearing initials J. E. F., August 23, 1935, to J. Meyer Schine, referred to, was received in evidence and marked as Plaintiff's Exhibit P-63.)

Mr. Clagett: And Plaintiff's Exhibit P-64, being a letter dated August 26, 1935, from Schine Theatrical Company, signed Lynch, to J. E. Flynn, Metro-Goldwyn-Mayer.

(Thereupon the letter dated August 26, 1935, from Schine Theatrical Company to J. E. Flynn, referred to, was received in evidence and marked as Plaintiff's Exhibit P-64.)

Mr. Clagett: Mark this as Government's Exhibit for identification P-65.

[fol. 1040] (Thereupon the contract recommendation referred to was marked as Plaintiff's Exhibit P-65 for identification.)

Mr. Clagett: If your Honor please, we have marked here Plaintiff's Exhibit for identification P-65. It is a Warner

contract recommendation with respect to a Schine contract for Bucyrus, dated November 29, 1935, and we should like to introduce this under the same ruling that applies to various contracts, correspondence and papers taken from the files of the major distributors, subject to any further connection that may be required.

Mr. Rogers: I object to that, your Honor, on any ground. It does not even come within the very liberal leeway your Honor has given the plaintiff in this action. This does not purport to be a communication. These are some observations that somebody in the Warner organization seems to make to himself, and there are annexed to it two sheets that are absolutely indecipherable. It is a mystery to me what this thing is all about.

The Court: Is it not sufficient for you to mark them for identification?

[fol. 1041] Mr. Clagett: This relates to the Warner contract which has been introduced in evidence and I cannot conceive of anything that is more in the ordinary course of business, a record kept in the ordinary course of business, than this.

The Court: What proof have you that it was kept in the ordinary course of business?

Mr. Rogers: There is not any. That is just my point.

The Court: Mark it for identification. It should appear where it came from.

Mr. Clagett: That is all.

Cross-examination.

By Mr. Rogers:

Q. Mr. Breyer, how long had you been operating the State Theatre in the town of Bucyrus all told up to the time you sold it?

A. I bought the theatre in June, 1934, and the deal with Schine was consummated in the last of September, 1935, a little over a year.

Q. When you first came into the town in 1934 you said there were two theatres, your theatre, the State Theatre, and the Southern Theatre that the Charnas Bros. operated; is that right?

[fol. 1042] A. Yes.

Q. Or was it just Phil Charnas?

A. It was a corporation. All I know was that Phil was the manager.

Q. What was the seating of the State Theatre?

A. 450.

Q. And what was the seating of the Southern Theatre, the Charnas house?

A. Approximately 525.

Q. About when was the State Theatre built, if you know?

A. I wouldn't know. That dates back pretty far.

Q. I mean it was a pretty old house, wasn't it?

A. Yes.

Q. Was the Southern a new house or a pretty old house too?

A. The Southern was an old house also.

Q. You say at that time when you came into the town there was a partially completed theatre. By that do you mean that it was a theatre that somebody started to build and then abandoned in the middle of building it?

A. Correct.

Q. Did you know much about the town of Bucyrus before you came in and took the State Theatre over?

A. Not too much.

Q. Had you been there on occasions?

A. Once or twice.

[fol. 1043] Q. Well, you know that a couple of syndicates tried to finish that unfinished theatre, didn't you, and they both fell down because they didn't have the financial resources?

A. My understanding on that building is that it was originally started by the Moose Lodge. I think they got as far as the foundation and the steel work and they didn't have enough money to complete it and it stood there, and then I understand that the contractor promoted some money to complete the building and he went broke on it.

Q. So that two successive groups tried to build it and both went broke and abandoned the job; is that correct?

A. Correct.

Q. So that when you came into the town Schine was not in the town, was he?

A. No, sir.

Q. Where was this uncompleted building?

A. On the same street, South Sandusky Avenue, but in the next block from our two theatres.

Q. That is sort of a main down town highway in the town, is it?

A. Yes, sir.

Q. And it was a rather unattractive looking thing with that unfinished building right in the heart of the town, [fol. 1044] wasn't it?

A. Yes, sir.

Q. After the Schines completed that building of course you had occasion to visit it and you also saw the building when you were the manager of it; is that right?

A. Yes.

Q. Will you describe generally how many seats were in that house?

A. 1097 to be exact.

Q. Was that a modern theatre?

A. Yes, sir.

Q. Air-cooled?

A. It was air-cooled but not air conditioned.

Q. I say it was air-cooled?

A. Air-cooled, yes.

Q. Upholstered seats?

A. Yes, sir.

Q. Carpeted.

A. Yes, sir.

Q. The latest improved sound equipment?

A. Yes.

Q. And it cost quite a bit of money to finish and equip that house, didn't it?

A. Yes.

Q. In your opinion, about how much?

[fol. 1045] A. To finish the building and equip it alone, I don't know the exact figures, but I would surmise——

Q. I mean from your experience as a moving picture operator?

A. Approximately $75,000.

Q. Well, comparing that theatre with your State Theatre what would the comparison be?

The Court: As to cost do you mean or appearance?

Mr. Rogers: Cost and appearance both.

A. Well, one was a big, beautiful modern theatre and the other one was an old-fashioned small theatre.

Q. Comparing the new Bucyrus Theatre with the Southern Theatre what would the comparison be?

A. We would have the same comparison there.

Q. You stated that when you attempted to buy product for that theatre for the 1934-1935 season that you made

your application out and the application was sent on to New York; is that right?

Mr. Clagett: Mr. Rogers, I think the date is wrong.

Mr. Rogers: I know what I am doing. I want to get 1934-1935 first.

Mr. Clagett: That is not his testimony though. His testimony is that the application he filled out was for the 1935-1936 product.

Q. When you went to make your application to Fox for your 1934-1935 product you signed an application in [fol. 1046] Cleveland, didn't you?

A. Not for Fox. I didn't have Fox product.

Q. You didn't have Fox at that time? You had Warner at that time, didn't you, in 1934-1935?

A. Yes, sir.

Q. When you signed your application that application was sent on to New York, wasn't it?

A. That is right.

The Court: That is the year you bought the theatre?

The Witness: That is the year I bought the theatre.

Q. Was it your experience in buying product for any theatre that you operated that you would go to the branch office, make your application there, and the application would go on to the New York office?

A. Well, deals generally were started with the salesmen.

Q. They were started with the salesmen?

A. That is right.

Q. Then you would go to the branch manager; is that right?

A. If I could not get a deal satisfactorily with the salesman then I worked with the branch manager.

Q. Whether you made the application with the salesman or with the branch manager that application was shipped on to New York; is that right?

A. For approval, yes.

Q. Or disapproval?

[fol. 1047] A. That is right.

Q. And that was the invariable practice, wasn't it?

A. That was the practice at the time.

Q. After you sold your State Theatre to Schine you did get the job that was promised you and you did go to work for Schine, didn't you?

A. Yes.

Q. And when did you start working for Schine?

A. The day the deal was closed for the theater. I started immediately.

Q. You started immediately in the State Theatre?

A. In the State Theatre, yes.

Q. Then you went into the new theatre and became the manager of the new theatre?

A. Of both theatres.

Q. Both theatres?

A. That is correct.

Q. When did you cease working for Schine?

A. On April 27th, this year.

Q. And you are not working for them now?

A. I am not working for them now.

Q. And you are in no manner connected with them?

A. In no manner connected with them.

Q. You have gone in business for yourself?

A. That is right.

[fol. 1048] The Court: How large a place is Bucyrus?

The Witness: Bucyrus is a town of 10,000 population.

The Court: Did the State continue to operate after Schine took it over?

The Witness: For a period.

The Court: Then it was discontinued?

The Witness: Then it was discontinued.

The Court: When was that?

The Witness: That was some time in the following year.

The Court: That would be 1936?

The Witness: In 1936.

The Court: Has it operated since?

The Witness: No, it is out of commission entirely. It is a store room. It has been remodeled for a store room.

Mr. Rogers: That State Theatre was reconverted to commercial use, wasn't it?

The Witness: That is right.

Q. And ceased to be a theatre?

A. Yes, sir.

Q. Rebuilt for commercial use, wasn't it?

A. That is right. Remodeled.

Mr. Clagett: That is all.

Mr. Rogers: That is all.

[fol. 1049] PHILIP CHARNAS, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Clagett:

Q. Will you please state your place of residence?

A. Toledo, Ohio.

Q. Did you start to operate theatres in Bucyrus, Ohio, about 1925?

A. Yes, sir.

Q. And you operated theatres there until about what period?

A. April, 1937, I believe it was, when I left there.

Q. Did you sell your theatre on the date mentioned to Schine?

A. Yes, sir.

Q. What theatre was that?

A. The Southern Theatre, known as the Crawford Theatre Company.

Q. Calling your attention to the 1933-1934 motion picture season, will you state——

The Court: Did you state when you sold the Schine?

The Witness: April, 1937.

Q. Will you state what the theatre situation was in Bucyrus in 1934?

A. In 1934 the town then consisted of the State and the Southern and the unfinished theatre there that had been [fol. 1050] started and the contractor quit on it.

Q. Who was operating the State Theatre in the 1934-1935 season?

A. Mr. Milt Breyer.

Q. Will you state what major product first run you used for the 1934-1935 season?

A. Fox, Paramount, United Artists and Columbia.

Q. Will you state, if you know, what major product first run was used at the State?

A. Warners, R.K.O., Metro-Goldwyn-Mayer. I believe he also run some Universal. I am not certain about that.

Q. You mentioned an uncompleted building. Was that building sold at public sale?

A. Yes, on the Court House steps.

Q. When was that?

A. I believe that was in the summer of 1935. What month I just don't recall. It might have been in June or July.

Q. Who bought the uncompleted building?

A. Schine's Enterprises.

Q. Did they start to construct a theatre or to complete the building into a theatre?

A. Very shortly after that, yes, sir.

Q. Was there any change in the ownership of the State Theatre?

A. Yes, there was.

Q. Do you know who acquired the State?

[fol. 1051] A. The Schines Theatres Enterprises.

The Court: You went all over that with Mr. Breyer.

Mr. Clagett: That is true.

Q. I believe you testified that in the 1934-1935 season you had the product of Paramount, Fox, United Artists and Columbia?

A. Yes, sir.

Q. Will you state whether you attempted to negotiate a contract for the first run of Fox product for the 1935-1936 season?

A. I did.

Q. Will you state with whom you had negotiations or conversations?

A. With Mr. Izzy Schmertz.

Q. What was his capacity with Fox?

A. Branch manager in Cleveland.

Q. Can you fix the date of your conversation with him?

A. Well, the exact date I couldn't tell you but I know it was some time in—I would say in July or probably the first part of August.

Mr. Rogers: What year?

The Witness: 1935.

Q. Will you state what was said with reference to the Fox product?

Mr. Rogers: May it please the Court, I object to that on [fol. 1052] the ground that there is no proper foundation laid, no proof of authority, of Mr. Schmertz. On the ground it is not binding on the defendants and on the ground that it relates to a purely local situation.

Mr. Clagett: Your Honor, the witness has already testified that he was operating the theatre in Bucyrus from 1925, and there is so much testimony in the record already about the capacity of these various exchange managers that I am just trying to save time.

Mr. Rogers: In order to save time I am willing to assume for the purpose of the record that Mr. Schmertz was the branch manager, but I still press my objection, your Honor, along the lines indicated.

The Court: If that is your objection, and not an objection that there is no proof that he was branch manager——

Mr. Rogers: I still press my objection as to the authority of Mr. Schmertz. I do concede for the purpose of the record that he was the branch manager at that time, that is all.

The Court: You concede he was branch manager?

Mr. Rogers: Yes, but I press my objection.

[fol. 1053] The Court: Objection overruled.

Q. Will you state your conversation with Mr. Schmertz in July or August, 1935?

A. I went in to buy the product for 1935 and 1936, which was after the purchase of the unfinished building in Bucyrus by the Schine Enterprises. I was unable to obtain——

Mr. Rogers: One moment.

The Court: That is your conclusion.

The Witness: Not my conclusion. I am getting to the point of buying my film.

The Court: Just state what was said.

The Witness: What Mr. Schmertz said?

The Court: Yes, what talk you had with him.

A. Mr. Schmertz told me that he was very sorry that he couldn't sell me the product.

Mr. Rogers: May it please the Court, I am a bit confused here. This witness, I understood, was testifying to a conversation he had with Mr. Schmertz in July or August. Then he said he had this talk after the New Bucyrus Theatre was finished.

The Witness: No, I beg your pardon. I didn't say after it was finished. I said after it was bought.

The Court: He said he could not sell. All right.

[fol. 1054] By Mr. Clagett:

Q. Did you get any Fox first run product for the 1935-1936 season?

A. No, I didn't.

Q. Will you state whether you attempted to negotiate a Paramount contract first run for the 1935-1936 season?

A. Either the same day or the day after I had been to the Fox Film Company.

Q. Who did you meet at Paramount, please?

A. Mr. Hemmline.

Q. He was the branch manager?

A. No, he was the office manager.

Q. Is the branch manager and the office manager the same?

A. No, the branch manager is the manager of the Exchange for the territory. The office manager is his assistant.

Q. You had bought film from Mr. Hemmline?

A. On many occasions previous to that.

Q. What was your conversation with Mr. Hemmline?

Mr. Rogers: I object to that on the ground that there has been no evidence sufficient to establish the authority of Mr. Hemmline, on the ground that it is immaterial and not binding on the defendants, and relates to a purely local transaction.

The Court: Overruled.

[fol. 1055] Q. State the conversation.

A. When trying to make the contract for the 1935——

Mr. Rogers: One moment. I move to strike as not responsive.

The Court: Just give the talk on the subject.

A. I wanted to make a deal for the product for 1935 and 1936.

Mr. Rogers: I move to strike it.

The Court: Yes. What did he say and what did you say? You told him you wanted to make a deal? Did you tell him that?

The Witness: Yes, I was ready to buy.

The Court: What did he say?

The Witness: He stated that he had had instructions that the product was not available for Bucyrus at that time.

By Mr. Clagett:

Q. Did you ever succeed in getting any Paramount product first run for the 1935-1936 season?

A. No, sir.

Q. Did you attempt to negotiate a United Artists contract first run for the 1935-1936 season?

A. I did.

Q. With whom did you have any conversation or negotiation?

A. The branch manager, Mr. Goodman.

Q. You had formerly dealt with Mr. Goodman as branch manager?

[fol. 1056] A. Yes, sir.

Q. Can you fix the date of this conversation?

A. It was also in the same week or at the same time, within one day or another. It was either that day or the day following. I wouldn't be certain.

Q. Of your conversations with Mr. Schmertz and Mr. Hemmline?

A. That is right.

Q. Will you please state the conversation you had with Mr. Goodman?

A. I wanted to make a deal for the product.

Mr. Rogers: I move to strike.

The Court: That is what you told him?

The Witness: Yes.

The Court: All right.

A. He stated at the time that there was a deal pending with Schine and until he heard from it he wouldn't know what he was able to do for Bucyrus.

Q. Did you ever succeed in licensing any United Artists first product in the 1935-1936 season?

A. No, sir.

Q. Did you attempt to negotiate a contract with Columbia for first run product for the 1935-1936 season?

Mr. Rogers: One moment. I object to that as calling for a conclusion and not the best evidence.

The Court: The conversation will disclose what the effect [fol. 1057] of it was. Did you have a conversation with someone connected with the Columbia Company?

The Witness: Yes, sir.

The Court: With reference to securing pictures?

The Witness: Yes, sir.

By Mr. Clagett:

Q. Who did you have this conversation with?
A. Mr. Bissell.
Q. What was his position?
A. Branch manager.
Q. And you had formerly dealt with Mr. Bissell, as branch manager, on the purchase of film?.
A. Yes.
Q. Will you state what was said in that conversation?

Mr. Rogers: One moment. Objected to on the same grounds as previously stated with reference to Mr. Goodman.

The Court: Overruled.

A. Mr. Bissell informed me that there was a deal pending also with Schine, that he was unable to let me know at that time what he could do for Bucyrus.

Q. Did you subsequently get a deal of any kind for any first run pictures with Columbia for the 1935-1936 season?
A. I did.
Q. What was the nature of the deal?
[fol. 1058] A. The deal with Columbia was——

Mr. Rogers: One moment. The contract is the best evidence.

The Court: I presume that is true. Do you have the contract?

Mr. Clagett: No, sir, I don't think the contract would disclose it.

Mr. Rogers: Mr. Clagett should not characterize what a paper not in evidence will or will not disclose. Let us have the paper and we will see what it discloses.

The Court: Was the contract in writing?

The Witness: The contract that was made on the pictures, your Honor, was in writing.

By Mr. Clagett:

Q. What kind of Columbia pictures did you exhibit or play at the Southern Theatre in the 1935-1936 season?
A. What you would call Class B pictures.
Q. Other than what you call Class B pictures of Columbia did you have any first run major product for the Southern Theatre in the 1935-1936 season?
A. No, sir.

Q. Did you have any independent product?

A. Yes, sir.

Q. Did you subsequently negotiate second run deals with any of the major companies?

A. I did.

[fol. 1059] Q. What companies did you have second run deals with?

A. The United Artists, Metro, Fox.

Q. Second run?

A. Second runs.

Q. I believe you testified that you sold the Southern Theatre to Schine in April, 1937?

A. That is right.

Q. Would you state the first time you had any contact with a Schine representative concerning the sale of your theatre?

A. I believe it was probably about three months after they acquired the unfinished building.

Q. And who was that conversation with?

A. Mr. Lazar.

Q. What did he say on that occasion?

A. He wanted to know if there couldn't be a deal worked out whereby he could take over the Southern Theatre for the Schine people.

Q. And subsequently, in 1937, a deal was arranged?

A. That is right.

Mr. Clagett: Your Honor, I have a few contracts to offer.

Mr. Rogers: You had better mark them for identification.

Mr. Clagett: The next Government's exhibit for identification is P-66, a film contract with Fox.

[fol. 1060] (Thereupon the Fox film contract referred to was marked as Plaintiff's Exhibit P-66 for identification.)

Mr. Rogers: With reference to Plaintiff's Exhibit P-66 for identification, I object to this on the ground that it is not binding on the defendants, that it relates to a purely local transaction and that no proper foundation has been laid for its admission or proof of its authenticity.

The Court: No foundation has yet been laid. I do not know what it is.

Mr. Rogers: That is why I am objecting to it. There is no foundation laid for it at all.

Mr. Clagett: Your Honor, this contract with these several others——

The Court: Can he identify it?

Mr. Clagett: He can identify this one.

The Court: All right.

By Mr. Clagett:

Q. Mr. Charnas, I show you Plaintiff's Exhibit 66 for identification, being a film contract with Fox, dated August 20, 1934, and ask you if that is your signature?

A. Yes, it is.

Mr. Rogers: I press the same objection. There is no [fol. 1061] authenticity with reference to Fox film on this at all.

The Court: Where did you receive this, Mr. Charnas? Where did you get this paper?

The Witness: This is the return copy of an approved contract from the Fox Film Company.

The Court: Where did you receive it?

The Witness: I received it at Bucyrus. After your application is made and the approved copy comes back to you they always mail it back to you from the Exchange. That is the only way an exhibitor can get a copy of it.

The Court: I will receive it.

Mr. Rogers: I will press my objection.

The Court: I will receive it.

Mr. Clagett: We offer Plaintiff's Exhibit 66 for identification in evidence

Mr. Rogers: I have made my objection and your Honor has ruled.

The Court: Received.

(Thereupon the Fox film contract previously marked as Plaintiff's Exhibit P-66 for identification was received in evidence.)

Mr. Clagett: Mark this contract for identification.

[fol. 1062] (Thereupon the film contract with Fox referred to was marked as Plaintiff's Exhibit P-67 for identification.)

Mr. Clagett: And mark this for identification.

(Thereupon the film contract with Fox referred to was marked as Plaintiff's Exhibit P-68 for identification.)

Mr. Rogers: These that are marked P-67 for identification, P-68 for identification, you are not offering in evidence; is that right?

Mr. Wright: We presumed you were going to say they were not authentic.

Mr. Rogers: With reference to those two I told Mr. Clagett there was no objection to them.

The Court: Received.

Mr. Clagett: I think the record should show that Government's Exhibit 67 is a Fox contract with Schine, dated August 5, 1935, and Plaintiff's Exhibit 68 is a Fox contract with Schine dated August 5, 1935.

(Thereupon the Fox film contract, dated August 5, 1935, previously marked as Plaintiff's Exhibit P-67 was received in evidence.)

(Thereupon the Fox film contract, dated August 5, 1935, previously marked as Plaintiff's Exhibit P-68 was received in evidence.)

[fol. 1063] Q. Mr. Charnas, I show you what purports to be a contract between yourself and Paramount for pictures for the 1934-'35 season, dated September 11, 1934, and ask you if that is your signature?

A. Yes, that is my signature.

Mr. Clagett: I will offer this.

Mr. Rogers: You are offering that in evidence?

Mr. Clagett: Yes,

Mr. Rogers: I certainly object to that on the ground that this piece of paper, whatever it may be, does not even bear signature of anybody from the Paramount Company. There is no approval stamped on it. It bears no signature of the Paramount Company, and I certainly object to that. It must first be authenticated as a contract between the parties to be binding on anybody.

Mr. Clagett:

Q. Is this the contract that you received from the Paramount Exchange?

Mr. Rogers: One moment, now. I object to the form of the question as leading.

The Court: The objection is it is not admissible as binding against the company because it must be signed.

[fol. 1064] Mr. Clagett: I want to know if this is the contract that they did produce.

The Court: It is not signed, as far as I understand it now. It has no binding force.

Mr. Clagett: We will have this marked for identification.

(Thereupon the paper referred to was marked as Plaintiff's Exhibit P-69 for identification.)

Mr. Wright: That is apparently a distributor's copy. I think it is produced by Paramount. The distributor has a signed copy, and he approves one and sends that back to the distributor. They are identical.

Mr. Clagett: Mark this for identification.

(Thereupon the paper referred to was marked as Plaintiff's Exhibit P-70 for identification.)

Mr. Clagett: I would like to offer this in evidence (referring to a photostat not yet marked).

Mr. Rogers: I shall certainly object to it on the ground it is not binding on us in any manner.

Mr. Clagett: Mark this for identification.

Mr. Rogers: It has no relevancy whatever to any of the issues raised on this situation.

[fol. 1065] (Thereupon, photostat of a communication dated December 16, 1936, referred to, was marked as Plaintiff's Exhibit P-71 for identification.)

Mr. Clagett: I would like to offer the Plaintiff's Exhibit P-71 for identification.

Mr. Rogers: I have already made my objection, may it please the Court, and I am quite sure if your Honor reads that, your Honor will agree to the objection.

Mr. Clagett: It is a communication.

Mr. Rogers: Let his Honor see it.

(Mr. Clagett hands Plaintiff's Exhibit P-71 for identification to the Court.)

Mr. Rogers: There is no objection to these two, except that the two men signing are local managers.

Mr. McKay: No, they were bookers. It is written on manager's stationery, but they were bookers.

The Court: They are received without objection.

Mr. McKay: Except with that qualification as stated.

(Thereupon photostat of letter dated April 14, 1937,

referred to, was received in evidence and marked as Plaintiff's Exhibit P-72.)

(Thereupon photostat of letter dated June 3rd, 1937, referred to, was received in evidence and marked as Plaintiff's Exhibit P-73.)

[fols. 1066-1068] Mr. Clagett: Plaintiff's Exhibit P-72, your Honor, is a letter on the stationery of the Belpik Theatre Corporation, signed by Ray G. Frisz, dated April 14th, 1937, to United Artists Corporation.

Plaintiff's Exhibit P-73 is a letter dated June 3rd, 1937, on Belpik Theatre Corporation stationery, signed by Joel Golden, addressed to Paramount Pictures Corporation.

The Court: We will recess until tomorrow morning at 10 o'clock.

(Whereupon, at 5:05 o'clock p. m., a recess was taken until Thursday, June 8th, 1944, at 10 o'clock a. m.)

[fol. 1069] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil Action No. 223

UNITED STATES OF AMERICA,

vs.

SCHINE CHAIN THEATRES, INC., et al.

Trial continued before the Honorable John Knight, United States District Judge, without a Jury, United States Court House, Buffalo, New York, Thursday, June 8, 1944, at 10 o'clock A. M.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Albert Boggess, Esq., Philip Marcus, Esq., Milton Kallis, Esq., Special Assistants to the Attorney General, in behalf of the United States of America.

Edmund McCarthy, Esq., Attorney of Record; Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur J. Homans, Esq., Howard M. Antevil, Esq., and Seth Richardson, Esq., of Counsel for Defendants.

[fol. 1070] PROCEEDINGS

PHILIP CHARNAS resumed the stand in behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Cross-examination.

By Mr. Rogers:

Q. With reference to the 1935-1936 product of Fox first run, I understand you to have testified that you went to the Fox office, branch office, in July or August, 1935, and spoke with Mr. Schmertz there, the branch manager, about getting the product for 1935-1936 first run; is that right?

A. Yes, sir.

Q. Was that the first talk you had with Mr. Schmertz about 1935-1936 product for that year?

A. Yes, sir.

Q. Had you spoken with Mr. Schmertz after that date about 1935-1936 product?

A. Not the first run.

Q. That is definite, is it?

A. Yes, sir.

Q. That is the only talk you had with him?

A. Yes, sir.

Q. Do you recall about that time in July or August, 1935, [fol. 1071] Mr. Schmertz coming to Bucyrus to call on you to discuss 1935-1936 product with you?

A. No, sir.

Q. You mean you never discussed it with him in Bucyrus?

A. Not to my recollection I don't. I don't recall that he ever came to Bucyrus to discuss product with me.

Q. You have no recollection on that subject?

A. No, sir, I have not.

Q. How many times did you discuss 1935-1936 product with Fox salesmen in Bucyrus?

A. I would say I probably discussed it with the salesmen two or three different times.

Q. Can you give us approximately the dates when you discussed it with them?

A. It would probably be just prior to that. It could possibly be that it might be as early as June.

Q. You mean it might be as early as June, 1935,——

A. That is right—with the salesmen.

Q. That you were discussing getting 1935-1936 first run of Fox?

A. That is right.

[fol. 1072] Q. Do you recall in the summer and early fall of 1935 Mr. Schmertz and Mr. Litchter,—by the way Mr. Lichter was a salesman who spoke with you about that product, wasn't he?

A. That is right.

Q. Do you remember them speaking with you repeatedly about trying to make a deal with you to take first-run product for 1935-'36?

A. Not Mr. Schmartz and Mr. Lichter together.

Q. Severally. Did either one of them at any time tell you that they were willing to give you the 1935-'36 product first-run during the summer or early fall of 1935?

A. I don't recall of Mr. Schmertz ever coming to Bucyrus.

Q. Answer my question.

A. That is what you are asking me.

Q. No, I asked you if you remember.

A. Of them coming to Bucyrus?

Q. Whether it was Bucyrus or whether the talk that took place in the Cleveland office. Don't you remember Mr. Schmertz offering the 1935-'36 first-run to you?

A. At about what time?

Q. June, July, August or September, 1935, before the product was sold to Schine?

A. No, sir.

Q. You say it was never offered to you?

[fol. 1073] A. It was offered to me in the beginning of the season.

Q. Who offered the product to you in the beginning of the season?

A. Mr. Lichter, the salesman.

Q. And that is first-run product, is that right?

A. That is right.

Q. And about when was that?

A. Well, generally they offered it to you about the time——

Q. No, when was it offered to you?

A. That is what I am trying to get to.

Q. Tell us when it was.

A. You know when they start selling products for the season.

Q. Yes.

A. The salesmen will make their rounds of the territory.
Q. And he came in and offered it to you?
A. That is right.
Q. First run for 1935-'36?
A. That is right.
Q. That was before it was ever sold to Schine?
A. That is right.
Q. Do you remember later Mr. Schmertz speaking with you?
A. No, I don't.
Q. One moment now, and he also offer*ing* you the product for 1936-'36 first-run?
A. No, I don't. I don't recall that.
[fol. 1074] Q. Do you mean you don't recall it, or he did not talk to you?
A. I don't recall of Mr. Schmertz offering me or trying to make a deal with me for the product of 1936-36.
Q. Would you say he didn't talk to you and did not offer you the product?
A. I wouldn't state that, not being certain.
Q. Do you remember when this product was offered to you for 1936-'36 that you stated that unless you could get that product for less than you paid for the 1934-'35, you would not buy it?
A. I don't believe I made that assertion.
Q. You said nothing of the kind?
A. I might have stated I wanted to make a deal for the product but not at advance in prices over '35.
Q. Didn't you say unless you could get the product for 1935-'36 at a price less than you got the 1934-'35, you wouldn't buy it?
A. I wouldn't say as a whole I said that.
Q. As a whole?
A. As a whole.
Q. Did you partly say it?
A. Might have been some discussion on part of the product at a lesser price.
Q. Who discussed that at a lesser price? Did you?
[fol. 1075] A. Mr. Lichter and I.
Q. Who talked of the lesser price?
A. I did.
Q. In other words, you suggested you wanted to get the 1935-'36 for a lesser price than you had the 1934-'35?
A. Not for all, the whole.

Q. Not the whole?

A. On part of the products.

Q. Mr. Charnas, I show you this letter and I ask you is that your signature? (A pause) Is that your signature?

A. Yes, sir.

Q. You remember writing that letter, don't you?

A. After reading it I do, yes.

Q. I show you this carbon copy. Do you remember receiving this letter in answer to that letter I just showed you? (A pause). You remember receiving that letter?

A. Yes, I do.

Mr. Clagett: Mr. Rogers, can I have the dates of those letters?

Mr. Rogers: In just a moment I am going to offer them as an exhibit, and I will be glad to show them to you.

Q. In answer to that letter do you also remember receiving this letter?

[fol. 1076] A. Yes, sir.

Mr. Rogers: I would like to offer these three letters, one being a letter on the stationery of Bucyrus Theatre Company, signed Bucyrus Theatre Company by Phil Charnas, Manager, bearing date September 21, 1935, addressed to Mr. I. J. Schmertz, Branch Manager, Fox Film Corporation, 2219 Payne Avenue, Cleveland, Ohio. Then letter bearing date September 25, 1935, signed 20th Century-Fox Film Corporation, signed I. J. Schmertz, Branch Manager, addressed to Mr. Phil Charnas, Southern Theatre, Bucyrus, Ohio, and the third is letter bearing date September 30, 1935, signed John D. Clark and addressed to Mr. Phil Charnas, the Bucyrus Theatre Company, Bucyrus, Ohio.

I offer all three as one exhibit.

Mr. Wright: Is the purpose of the offer to prove any of the statements made in the letter by Mr. Clark and Mr. Schmertz, or is it just to show that Mr. Charnas received the letters?

Mr. Rogers: I expect by cross-examination to endeavor to reveal the situation here.

The Court: If it is for the purpose of contradiction [fol. 1077] it is competent. Is that the purpose?

Mr. Rogers: Yes, sir, flatly contradicts.

Mr. Wright: It can't contradict the statements that are made by these other gentlemen in letters. I suppose if they want to contradict conversations, Clark and Schmertz

would be called as witnesses to do it. I am talking about the letters written by Clark and Schmertz.

Mr. Rogers: In response to the letter—I will hand it up.

The Court: It would be competent as it relates to the same matter.

Mr. Rogers: It relates to the same matter, flatly contradicts the testimony. (Handing the three letters, referred to, to the Court.)

The Court: You don't claim that this letter contradicts it? This letter?

Mr. Rogers: No, sir, but the others.

Mr. Wright: That is the letter that Mr. Charnas wrote.

The Court: I don't think these two letters are competent. The first one is written by him. The others are part of your affirmative case.

Mr. Rogers: He admits receiving those two letters.

The Court: Yes, I know.

[fol. 1078] Mr. Rogers: And I intend to interrogate him about those two letters from Mr. Schmertz and Mr. Clark.

The Court: Of course, the letters from the two representatives of the Company, unless there is an answer to it, it is not binding at all.

Mr. Rogers: May it please the Court, these two letters are in answer to Charnas' letter.

The Court: They are.

Mr. Rogers: Yes, sir.

The Court: I will not receive them at this time. He has answered those letters and they answered him.

Mr. Rogers: Exactly, sir.

The Court: The two are excluded. The first is received.

Mr. Rogers: I will not offer the first unless the other two are received. I would like these letters——

The Court: Marked separately?

Mr. Rogers: I will have them marked separately now for identification.

(Thereupon the letter dated September 21st, 1935, referred to was marked as Defendants' Exhibit D-32 for identification.)

(Thereupon the letter dated September 30th, 1935, referred to, was marked as Defendants' Exhibit D-33 for identification.)

[fol. 1079] (Thereupon the letter dated September 25th,

1935, referred to, was marked as Defendants' Exhibit D-34 for identification.)

[fol. 1080] Q. I believe you testified that when you had your talk about Fox product for 1935-1936 and you spoke to Mr. Schmertz you said, "I have been a good customer and I am entitled to get this product"; isn't that right?

A. I believe so.

Q. As a matter of fact, at the time you spoke about this 1935-1936 product—which was when? When do you claim that was?

A. I would say, to be emphatic about it, it would be the summer of 1935.

Q. By the summer what do you mean, July, August, September?

A. Along in there. After all, to come down to a specified date, I don't know.

Q. July, August or September?

A. That is right.

Q. Could it have been as late as September?

A. It could be.

Q. Could it have been as late as the latter part of September of 1935?

A. I wouldn't know. I couldn't recall at this time.

Q. Could it have been as late as the middle of September?

A. It might be.

Q. As a matter of fact, in the middle of September in 1935 weren't you actually delinquent in the payment of your bills for product to Fox?

[fol. 1081] A. Not that I recall.

Q. Do you remember playing a picture called "Curly Top" in the month of September, Shirley Temple?

A. That is right.

Q. And do you recall playing "Curly Top" from September 8th to September 11th, first run?

A. I believe so.

Q. Do you remember whether you played that picture on a flat rental or whether it was a percentage?

A. A percentage.

Q. Do you remember that in the month of September, after you played that picture, you hadn't paid your film rental on that picture?

A. What do you mean by "film rental"—the proportion of the percentage or the film rental?

Q. That is all film rental, isn't it?

A. Percentage of what they earn and film rental is flat.

Q. Isn't the percentage what you pay for your film rental?

A. If the film is rented, yes.

Q. Isn't that right?

A. Yes.

Q. Isn't it a fact that you had not paid for the film rental on that Shirley Temple picture, "Curley Top", by the middle of September?

A. It might have been. I wouldn't recall at this time.

[fol. 1082] Q. Isn't it true that you hadn't paid for it by the end of September, 1935?

A. I wouldn't be certain of that. It is possible.

Q. Isn't it possible you hadn't paid for it by the end of December, 1935?

A. I wouldn't say. I don't recall.

Q. What is your best recollection?

A. I wouldn't have any recollection on that at this time.

Q. Do you remember that as late as January, 1936, you still hadn't paid for it?

A. I don't remember that.

Q. In playing your percentage pictures you were supposed to pay for your percentage when you get finished playing the picture, aren't you?

A. I believe that is what I always did. The record will show it.

Q. Did you do it on that Shirley Temple picture?

A. There may have been some reason for holding it up.

Q. No. Did you?

A. I don't know. I am only giving you a statement that there may have been a reason for holding up the payments. I am not going to commit myself on something I don't recall right off.

Q. I want to show you this and ask you if you recall having received that letter from Mr. Schmertz? Do you [fol. 1083] remember receiving that letter (handing to witness)?

A. I believe so.

Mr. Rogers: I offer it in evidence.

Mr. Clagett: Your Honor, we object to this as not being material in any way. It does not have any bearing upon

the probity of this witness, these little details of some financial transactions or dispute.

Mr. Wright: For what purpose is it offered, Mr. Rogers?

Mr. Rogers: The witness testified he was a good customer. A good customer does not fail to pay his obligations.

Mr. Wright: That letter does not prove that he failed to pay any obligations.

Mr. Rogers: The witness out of his own mouth testified he played it in September and was supposed to pay it immediately, and here is a letter as late as January that he had not paid it at that time.

Mr. Wright: He has also testified there was a good reason for holding up the payment.

Mr. Rogers: Let us first get the fact that he didn't pay.

Mr. Wright: Ask him about whether he didn't pay. This letter does not prove it.

Mr. Rogers: I am going to prove a sequence. This is one [fol. 1084] of a steps in a sequence.

The Court: Objection sustained.

Mr. Rogers: Mark that for identification, please.

(Thereupon the letter of January 20, 1935, referred to, was marked as Defendants' Exhibit D-35 for identification.)

The Court: I will let you ask him whether he was delinquent. Of course a delinquency in January for a particular picture produced subsequent to the time that Schine took the contract would not be of any materiality anyway. If there was a financial delinquency prior to that time——

Mr. Rogers: This is what it is. The picture was played in September. The picture was actually played in September of 1935.

The Court: This does not refer to that picture anyway, does it?

Mr. Rogers: It does, sir. And he didn't pay it until January.

The Court: It says nothing about the picture.

Mr. Rogers: I particularly asked him did he play this picture, "Curly Top", a Shirley Temple picture.

The Court: Is that mentioned in the letter, "Curly Top"?

Mr. Rogers: I asked him and he said he did.

The Court: I understand that, but this letter does not [fol. 1085] refer to that picture at all.

Mr. Rogers: If your Honor will just give me an opportunity—I said that is one step. Now I want to give him the next step.

Mr. Clagett: In that connection I would like to call attention to the fact that the Fox-Schine contract is signed and approved the 5th of August, 1935.

Mr. Rogers: This witness testified he was talking about that product as late as the middle and the end of September, 1935.

Mr. Clagett: He might not have known about this contract.

By Mr. Rogers:

Q. Now, with reference to this Defendants' Exhibit 35 for identification, did you ever send an answer to that?

A. I don't recall at this time.

Q. I show you this letter, bearing date January 22, 1936, addressed to you, and ask you do you recall receiving that letter (handing to witness)?

A. I may have received it. I don't just recall right now.

Q. You may have received it?

A. Yes, sir.

Mr. Rogers: I wish to have this marked for identification. This is a letter bearing date January 26, 1936, ad-
[fol. 1086] dressed to Mr. Phil Charnas, Southern Theatre, Bucyrus, Ohio.

(Thereupon the letter of January 26, 1936, referred to, was marked as Defendants' Exhibit No. D-36 for identification.)

Q. Now I ask you whether Defendants' Exhibit 35 for identification and Defendants' Exhibit 36 for identification both relate to the same subject matter?

A. That I wouldn't know or recall right now. It possibly would because I don't recall of ever owing them any other moneys.

Q. You know at that time when both of those letters were received you were delinquent on the picture "Curley Top", don't you?

A. I don't say it would be "Curly Top". It was probably on a percentage picture.

Q. I ask you to look at the statement attached to Defendants' Exhibit 36. That statement was attached to the letter when you received it, wasn't it?

A. I wouldn't recall right now whether it was or whether it was not. It may have been.

Q. It may have been?

A. That is right.

Q. The balance on that statement is how much?

A. The balance on this here is $51.01.

Q. Wouldn't that indicate to you that the letter of Mr. [fol. 1087] Schmertz to you of January 20, 1936, Exhibit D-35, and Heiliger's letter of January 22, 1936, both relate to the same delinquency?

A. Possibly.

Q. Now I show you letter bearing date January 25, 1936, on the heading of Bucyrus Theatres Company, signed "Southern Theatres, by Phil Charnas, Manager", addressed to 20th Century-Fox Film Corporation, Cleveland, Ohio. Is that signature on there in your handwriting?

A. That is right.

Q. Does that letter refresh your recollection as to whether or not that was the first time you paid that bill?

A. It probably was.

Q. Doesn't the amount set forth in that exactly tally with the $51.01?

A. It does, yes.

Q. Does it also refresh your recollection that you made that payment by sending two checks in post-dated?

A. That is right.

Q. That is right, isn't it?

A. That is right.

Q. In other words, you sent one check in that letter bearing date January 25, 1936, and one dated January 30th?

Mr. Wright: If the Court please, we will concede after Schine took his product away he had a hard time meeting [fol. 1088] his obligations.

Mr. Rogers: I don't want you to concede anything.

The Court: It does not appear what this delinquency was for, what particular picture. If it was subsequent to the time that Schine made the contract I do not see that it has any bearing. Delinquency before might be urged as a reason why they would not contract with him.

Mr. Rogers: I am going to carry him back, may it please the Court. I am going to establish it from the first.

The Court: Does it appear that this picture, out of which you claim this delinquency arose, was shown?

Mr. Rogers: According to the statement which he says he presumes was attached to the letter when he received

it it shows the picture was played from September 8 to September 11, 1935.

Mr. Clagett: I again point out that that was after the contract was entered into.

The Court: The contract with Schine was made prior to that date. I do not see what bearing a default subsequent to the Schine contract has here. If you can point it out I would like to hear it.

Mr. Rogers: I am going to carry this witness back to a [fol. 1089] prior date.

The Court: It is not material if the delinquency occurred subsequent to the Schine contract.

Mr. Rogers: I ask to have this marked for identification, a letter of January 25, 1936, of Southern Theatre.

(Thereupon the letter of January 25, 1936, referred to, was marked as Defendants' Exhibit D-37 for identification.)

Mr. Rogers: I now offer D-35, D-36 and D-37 in evidence.

Mr. Clagett: We object to all of these documents on the ground that, as your Honor has already indicated, they bear upon a financial transaction that occurred after the Schine-Fox contract was entered into.

The Court: Let me see Exhibit 37. I did not see that.

(Letter handed to the Court.)

The Court: If it appeared that it is for pictures shown by this witness subsequent to the Schine contract it will be excluded.

Mr. Wright: He has already testified that picture was played in September, as I recall, the Shirley Temple picture they are talking about.

Q. Is it your testimony——

[fol. 1090] Mr. Clagett: May we have a ruling?

The Court: Excluded. It has been marked for identification.

Mr. Rogers: It has been marked for identification, but excluded from evidence by your Honor. That is my understanding.

The Court: Yes. Not received at this time. It is marked for identification.

By Mr. Rogers:

Q. I understood you to say a few moments ago that with reference to the picture I just spoke to you about involv-

ing a delinquency of $51.01, that that is the only time that you were ever delinquent in payments to 20th Century-Fox film or Fox Film Corporation, prior to August of 1935; is that right?

A. No, sir.

Q. You mean that is not so?

A. No, sir.

Q. You mean you were delinquent?

A. Right.

Q. On a number of occasions?

A. That is right—during the depression.

Q. I say, you were delinquent——

A. During the depression.

Q. Which years were those?

A. That was back in 1930 and 1931.

[fol. 1091] Q. You mean from 1931?

A. After the Market crash, yes, I was delinquent with probably a number of concerns I was doing business with at that time.

Q. I am asking you did that hold good only up to the year 1931?

A. No, I wouldn't say that.

Q. You mean you were delinquent after the year 1931 too, weren't you?

A. That is right.

Q. With Fox film?

A. And with the other concerns.

Q. And with all the other firms you dealt with?

A. Yes.

Q. On frequent occasions?

A. Yes. And I don't believe I was alone in that condition either.

Mr. Rogers: I move to strike.

The Court: Yes. Just answer his questions.

Q. I show you a letter on the letter-head of the Bucyrus Theatres Company, signed "Southern Theatres, by Phil Charnas, Manager", addressed to Paramount Pictures Distributing Corporation, 1735 East 21st Street, Cleveland, Ohio, dated August 24, 1935, and I ask you is that your signature (handing letter to witness)?

[fol. 1092] A. That is right.

Mr. Rogers: I offer it in evidence.

The Court: Was Mr. Goodman the agent of Paramount?

The Witness: The United Artists.

The Court: Who was the agent of Paramount?

The Witness: Hemmline.

Mr. Rogers: It is not agent. It is branch manager. [fol. 1093] Mr. Rogers: There is no objection to this, is there, Mr. Clagett?

Mr. Clagett: Yes, there is objection to this. Here is another letter where Mr. Charnas seems to be delinquent in a matter of $53.50. There is no showing at all that the refusal of Paramount to deal with Mr. Charnas for the 1935-36 season had anything whatsoever to do with this transaction.

Mr. Rogers: One step at a time. Mr. Charnas is here at the present time and we won't have him here in the future.

The Court: Received.

(Thereupon the letter dated August 24, 1935, was received in evidence and marked as Defendants' Exhibit D-38.)

The Court: Is there anything to show when the contract was signed?

Mr. Rogers: Yes, after that. This letter is dated August 24, 1935, and the contract was not made until September 18th, 1935.

Mr. Wright: We are opening up quite a field if we are going into situations where there were disputes; Schine [fol. 1094] was involved in some cases in altercations with distributors.

Mr. Rogers: Mr. Wright, now, never mind.

Mr. Wright: Will you please not interrupt? If the trial is going to be a question on the issue of who was involved in the most altercations with distributors, these complainants or Schine, that is another issue. It certainly is not one made by the pleadings. We can meet them on that issue, but it seems to me that gets pretty far afield from the issues we are trying.

Mr. Rogers: The distributors always has customer choice and it is laying a foundation for that as well as testing the credibility of this witness; both.

Mr. Wright: The distributor is always engaged in various transactions with his customers, both Schine and the independents. There are a constant series of disputes arising on contracts and film rental. That is one of the in-

cidents of the business. If it is regarded as material how many times a complaining witness had such a dispute, then I suppose we would have to go in on the defense as to the question of the number of times Schine had such disputes [fol. 1095] and the trial of that issue would not contribute to the issues raised by the lawsuit.

Mr. Rogers: I beg your pardon, Mr. Wright. You know that that is not good law. The distributors have the right of customer choice, if that right is exercised in good faith, and if we can show that these people who did not get paid were not good customers, customers whose records were bad and I am showing this out of the mouth of this witness, the question of customer choice certainly comes into the case.

Mr. Wright: But if the distributor says: "We won't sell you because of such and such a delinquency," but he is not offering to show that at all. All he is offering to show is there were delinquencies.

Mr. Rogers: That takes into consideration the credit standing of the two people.

The Court: If it is claimed they refused to do business with the witness here, what the status of the delinquent is, why, I think if that is supported by something in the correspondence, ordinarily——

[fol. 1096] Mr. Rogers: This is testimony right out of the witness' own mouth.

The Court: The exhibit does not refer to it at all.

Mr. Rogers: Yes, sir.

The Court: The one that you marked?

Mr. Rogers: I am referring to this one, may it please the Court.

Mr. Wright: The witness testified that Paramount simply refused to deal with them, nothing said about delinquencies. The only thing that was said was they were dealing with Schine. If he wants to show Paramount refused to deal with him because he was a bad account with them than it is relevant, but certainly he does not show that by merely showing these disputes.

Mr. Rogers: One moment. I showed it by this witness testifying he was repeatedly delinquent with all of these distributors.

The Court: He said in 1931 or a certain period of time?

Mr. Rogers: No, even beyond that.

The Court: These companies refused to deal with him right along?

Mr. Rogers: Your Honor may discover as we go along here there was very little choice here, and if you will let me [fol. 1097] alone, as they endeavor to prove their conspiracy step by step, I have to prove my defense step by step.

The Court: Mark it for identification.

Mr. Rogers: The last one was received in evidence. I understand. That was the one where the delinquency occurred before, and your Honor received it in evidence.

By Mr. Rogers:

Q. Do you remember in your talk for the 1935-36 product with Mr. Schmertz of Fox Film Corporation, you said to him that if they didn't make a deal with you, the other theatre in the town wouldn't purchase the product and they would have to stay out of the town?

A. No, sir.

Q. Let me ask you this: Didn't you tell Mr. Schmertz that he couldn't sell the Fox product to anybody but you at the Southern Theatre in that town?

A. I don't believe I ever said anything of the kind.

Q. Didn't you have a working arrangement at that time with the State Theatre—the competitive theatre—that you divide the product of major companies between you, that whatever the State Theatre was allocated between the two of you, they wouldn't bid against you and whatever was allocated to you the State wouldn't bid against. Is that [fol. 1098] so?

A. Can I answer that in my own way?

Q. No.

A. You can crucify me here by "Yes" or "No".

Mr. Wright: Just a minute. There is an objection to the question. What possible bearing has such an agreement on what Schine did, assuming it was made or not?

Mr. Rogers: It has the bearing—Mr. Wright always forgets his pleadings, unfortunately, it bears on the issue he has raised in his complaint, and which he has raised in his bill of particulars, that there were eight separate conspiracies between these distributors and the exhibitors to restrain trade. If these two distributors in the town divide product between them and decide they would not compete, in other words, if Mr. Charnas got Fox, State would not bid

for the product, and if State got United Artists, Charnas would not bid for United Artists. Instead of the distributors being the awful conspirators, these very people were the conspirators, and didn't permit an open market, didn't permit open bids, didn't allow open competition.

[fol. 1099] Mr. Wright: If he can show there was prior conspiracy in the town, then it was all right for him to enter into a conspiracy with Schine. I don't see how that could be a justification.

Mr. Rogers: That, further, brings up customer choice again. If they were operating against them until all this time Schine came into the town and having been subjected to that kind of treatment and having a responsible customer come into the town, they certainly have the right to take a responsible customer against the two distributors who had the town sewed up or were at the mercy of them.

Mr. Clagett: There wasn't any validity in that proposition at that time because here was a new theatre being built under their eyes in the town by Schine.

The Court: I will receive it.

By the Court:

Q. What do you say about that, the arrangements?

A. Your Honor, how could there be an arrangement made between two distributors?

The Court: Don't ask me any questions.

[fol. 1100] The Witness: I am only trying to explain to you.

The Court: I couldn't answer you.

The Witness: I am trying to explain.

Mr. Rogers: I move to strike what the witness has said up to the present.

The Court: Strike it out.

Mr. Rogers: May we have the question read to the witness?

(Last question, read, as follows:

"Q. Didn't you have a working arrangement at that time with the State Theatre—the competitive theatre—that you divide the product of major companies between you, that whatever the State Theatre was allocated between the two of you, they wouldn't bid against you and whatever was allocated to you the State wouldn't bid against. Is that so?")

Mr. Wright: If the Court please, I submit that is a double-barreled unintelligent question. Nobody can understand it.

Mr. Richardson: I can understand it.

Mr. Rogers: Except Mr. Wright. I will reframe the question.

The Court: Maybe the witness can answer the question.

The Witness: If you will let me answer my own way, I can [fol. 1101] answer it.

The Court: It calls for "Yes" or "No".

The Witness: Then I can't answer it because you crucify yourself by the answer.

Mr. Rogers: I move to strike that "you crucify yourself by the answer".

The Witness: It can be misinterpreted.

The Court: Just a moment. We will have to have a little order out of the chaos. The witness will answer the questions without volunteering answers.

The Witness: There was no arrangement made.

The Court: Just a moment. I have to caution you repeatedly. Counsel has the right to ask the questions and you answer. If you can't answer it, you can say so without going into your reasons or discussing it.

The Witness: Can I have that question again, please?

The Court: If you can't answer it, say so.

(The question was again read.)

The Witness: Emphatically not.

Mr. Rogers:

Q. Did you ever have any agreement or understanding, whether in writing or oral, with your competitor, the State Theatre, that neither one of you would bid against the [fol. 1102] other for product with the major companies?

A. No, sir.

The Court: I believe he answered that question.

Mr. Rogers: The question of allocation. I thought maybe on account of the way I framed the question.

The Court: He said "No". All right.

By Mr. Rogers:

Q. Well, during the season 1933-34, did you go to the major companies, or any one of the eight companies, to ask for product that was playing at the State Theatre?

A. Not to my recollection.

Q. During the season 1934-35, did you go to the major companies trying to bid for any of the product shown at the State Theatre?

A. Absolutely not.

Q. To your knowledge did the State Theatre go to the major companies to bid for any of the major products you were playing at the Southern Theatre?

A. That I wouldn't know.

Q. You wouldn't know that, would you?

A. No, sir.

Q. I believe you testified that when you were operating the Southern Theatre that there was an uncompleted theatre in the town on which the builders had fallen down because they couldn't go through with the necessary financing, is that [fol. 1103] right?

A. I believe so.

Q. And that that theatre was sold at public auction?

A. That is right.

Q. And that public auction was advertised, was it not?

A. I believe it was.

Q. And you knew it was going to be sold, didn't you?

A. No, I don't recall whether I did or not until the day of the sale.

Q. You mean the first knowledge you had was the date of the sale?

A. That is right, the date of the sale.

Q. Did you attend the sale?

A. Yes, sir.

Q. Did you bid?

A. No, sir.

Q. At that sale anybody could have bid?

A. That is right.

Q. Conducted openly and publicly?

Mr. Rogers: That is all.

Redirect examination.

By Mr. Clagett:

Q. Mr. Charnas, just one question: When you had the conversation that you have testified, with Mr. Hemmline, of [fol. 1104] Paramount, when you were attempting to negotiate for 1935-36 product, did Mr. Hemmline say anything

to you about the fact that Paramount was not willing to deal with you because you had any unpaid bills, or were delinquent on any pictures?

A. Emphatically not.

Mr. Clagett: That is all.

Recross-examination.

By Mr. Rogers?

Q. One moment. Didn't Mr. Hemmline tell you at that time when you were dealing for this 1935-36 product, that the company was displeased with the dictatorial way in which you acted when you bought product in prior seasons? Didn't he tell you that?

A. No, sir.

Q. Didn't he tell you at that time that you had dictated your terms in the past and on two successive years, refused to take the product of Paramount, didn't he?

A. I don't recall of ever having the company tell you that you dictated terms to them.

Q. Didn't he tell you you had refused their products for two successive seasons?

A. I don't remember that, no, sir.

Q. You don't remember you did refuse their products for [fol. 1105] two successive seasons?

A. Might have been we couldn't get together.

Q. You refused it, did you?

A. Not being refused, just being the case you couldn't get together on the price.

Q. Those two seasons you didn't take the product, did it play the State Theatre—Paramount?

A. No, sir, I don't believe so.

Q. You mean it didn't play the town at all?

A. I don't believe so. I don't think the State was open at the time.

The Court: All right. Next witness.

HALMER D. SHREFFLER, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schilz:

Q. Mr. Shreffler, please state your residence address.
A. Shelby, Ohio.
Q. Have you a street number there?
A. 45 Whitney.
Q. What is your occupation?
[fol. 1106] A. Theatre Manager.
Q. With what theatre are you connected in Shelby?
A. The Castamba.
Q. Are you associated with any one in the operation of that theatre?
A. Yes, sir.
Q. With whom are you associated?
A. Schine Shelby Corporation.
Q. And in what capacity, Mr. Shreffler?
A. Well, I own 50 per cent of the stock and I am the resident manager.

Mr. Schilz: If the Court please, we are calling this witness under Rule 43-B of the Rules of Civil Procedure, and will examine and interrogate as an adverse party.

Mr. Rogers: May it please the Court, no foundation has been laid to interrogate this witness as an adverse party, not a defendant in the suit. He is not a party to the suit.

Mr. Schilz: If the Court please, the witness just testified——

The Court: It does not only apply to adverse party but adverse witness, as well. Let us proceed with the examination and see what develops. Maybe it is a wrong presumption.

[fol. 1107] Mr. Schilz: I would like to read to the Court the answer of the Schine defendants to interrogatory No. 17-A, which states the name of the town as Shelby, name of the theatre is Castamba, the nature of their interest is lessee, extent of interest 50 per cent; the date acquired September, 1937; other interests, if any, and extent thereof, H. Shreffler, 50 per cent, seating capacity 749; owned or leased, leased. If leased, name of lessor, Castambe Realty

Company, Shelby, Ohio. Name of present opposition theatre, Opera House up to about October, 1937, and the State since October, 1937.

Mr. McKay: Your Honor, the interrogatory itself only calls for a statement of the theatres in which the Schine defendants have a direct or indirect interest. The corporation that owns or leases this Castamba Theatre is not a defendant in the case. It is only a corporation in which one of the Schine defendants has a 50 per cent interest. This witness is not an officer, stockholder, director or manager of any defendant in this case. He is a half owner.

[fol. 1108] The Court: The rule is a little broader than that. You can interrogate any unwilling or hostile witness on any question.

Mr. McKay: He has been associating with the Plaintiff's counsel for the last three days, and if they place their position on that, that is another matter, but I think the facts speak for themselves.

The Court: I think you should proceed with your examination to determine the question of his hostility. There may be no occasion for that question at all.

Mr. Schilz: In answer to the objection or the statement that the Schine defendants have only an indirect interest in this theatre corporation, I would like to call the Court's attention to their answer to interrogatory No. 15, which is headed "List of owned corporations in which defendant has at any time since August 31st, 1931, owned any financial interest," and under that heading is listed: "Schine Shelby Corporation. Nature of business. Operating. Extent of interest: Stockholder 50 per cent. Date acquired: September 21st, 1937. From whom: Original issue."

[fol. 1109] Mr. McKay: That is exactly what I stated to your Honor. I said one of the Schine defendants had a 50 per cent interest in the corporation which leased this theatre.

Mr. Wright: As I understand it, your Honor, under the rule, he is managing agent for this corporation in which the defendant owns a half interest in Shelby. As a rule, I believe it covers agents as well as——

Mr. Rogers: Of a party. And the Shelby Corporation is not a party to this litigation.

Mr. Schilz: In further supplement of this evidence on the Schine defendants' corporate interest in the Castamba Theatre, I want to bring the Court's attention to answer to

interrogatory No. 19-C, on page 7 of paragraph 14 is listed "Shelby, Ohio, Castamba Theatre, Schine Chain Theatres, Inc., purchased 50 per cent of the stock of Schine Shelby Corporation for the sum of $15,000. Schine Shelby Corporation was the lessee of the Castamba Theatre for a term of 20 years, commencing September 27th, 1937, and expiring September 27th, 1957, at a rental of $3,000 per annum, [fol. 1110] the remaining 50 per cent of the stock of Schine Shelby Corporation is owned by H. D. Shreffler, who is a part owner of the fee and the former operator. As further consideration, Mr. Shreffler was given a contract of employment by Schine Shelby Corporation for two years at a salary of $50 per week, and Schine Shelby Corporation assumed an unpaid balance of $1400, due on sound equipment installed in the theatre by Shreffler."

[fol. 1111] Mr. McKay: That is exactly what I told you before.

Mr. Schilz: Under the heading "Interrogatory 15: List all corporations in which defendant has at any time since August 31, 1931, owned any financial interest", is also found "Schine Theatrical Company, Inc." "Nature of interest: Operating. Extent of interest: Stockholder 100%. Date acquired"——

The Court: Schine was a one hundred per cent stockholder in the theatre?

Mr. Schilz: I don't maintain that at the moment. I want to put that in the record, your Honor, because it will develop in a moment. In the Schine-Shelby Corporation, which i Interrogatory 19-C in the answer it is stated is owned by Schine Chain Theatres, Inc., one of the defendants in this action.

Mr. Rogers: But there is nothing that indicates that Mr. Shreffler has any interest in any company that is a defendant in this action. It is a company that is not a defendant in this action, and therefore the rule of adverse witness cannot apply to one who is neither an officer, director or agent of a corporation that is not a defendant in this action. It [fol. 1112] must be a defendant in this action.

The Court: Proceed with the examination and let us see.

By Mr. Schilz:

Q. Mr. Shreffler, how long have you been operating the Castamba Theatre at Shelby?

A. Since 1922. That is when Mr. Allwein and I leased the theatre.

Q. Directing your attention to the year 1936, did you receive any offers from any one for the purchase or acquisition of an interest in the Castamba Theatre?

A. I received many offers for the theatre, starting in 1930, from different people all over the country, Chicago, Pittsburgh.

Q. Directing your attention now to the year 1936, your answer was not responsive.

A. I didn't own any part of it. Caster & Stambaugh did. I was only the lessee of the theatre at that time.

The Court: In 1936?

The Witness: Yes, sir.

Q. In 1936 did the lessor call to your attention offers received for the purchase of the Castamba Theatre?

Mr. Rogers: Pardon me, may it please the Court, that is hearsay.

The Court: That is hearsay. State what you know about any offers.

[fol. 1113] A. They had got a letter——

Mr. Rogers: That is all hearsay and I want it stricken, please.

The Court: Strike it out.

Q. Mr. Shreffler, in 1936 did you communicate with any one concerning the leasing or ownership of the Castamba Theatre?

A. Yes, sir.

Q. With whom did you communicate?

A. Mr. Lazar of Bellefontaine.

Q. What Mr. Lazar?

A. Mr. Louis Lazar.

Q. With what company is he connected?

A. The Belpik Picture Corporation.

Q. When did you first communicate with him?

A. I wrote him a letter, I believe, in January, 1936.

Q. Will you state to the Court the reason that you wrote to Mr. Lazar?

Mr. Rogers: One moment. May it please the Court, if it calls for the contents of a written communication then I

object to it on the ground that the written communication is the best evidence. If it calls for the operation or the speculation in the mind of the witness then I also object to it.

The Court: Sustained.

[fol. 1114] Q. Was a subpoena duces tecum served on you to produce correspondence and documents relative to the operations of the Castamba Theatre?

A. Yes, sir.

Q. Have you some of that correspondence with you?

A. Yes, sir.

Q. Will you produce it?

A. (Witness hands to Counsel.)

Q. Have you with you the letter which you wrote to Mr. Lazar in January of 1936?

A. It is either in there or here (indicating). Here it is (indicating).

Mr. Schilz: Will you mark this letter for identification?

(Thereupon the letter of January 23, 1936, referred to, was marked as Plaintiff's Exhibit P-74 for identification.)

Q. Is this letter marked for identification Plaintiff's Exhibit 74 a letter in your own handwriting?

A. Yes. It is a copy. This is a copy of the letter I sent Mr. Lazar.

Q. What is the date of this letter?

A. January 23, 1936.

Mr. Schilz: I offer this letter in evidence.

Mr. Rogers: I object to it on the ground that the witness has testified that this purports to be a copy of a letter that [fol. 1115] he wrote on that date. The original is the best evidence and there is no proof that this letter had ever been received.

Mr. Schilz: Have you the original, Mr. Rogers?

Mr. Rogers: I do not know. Did you ever ask us to produce it?

Mr. Schilz: There was a subpoena duces tecum served on you which would cover the original of this letter.

Mr. Rogers: May we know the provision of any subpoena duces tecum that you claim you served that would cover that?

Mr. Schilz: If your Honor please, Mr. Shreffler has identified this as being a copy of a letter that he sent.

The Court: You should have served a notice to produce on the defendant.

Mr. Rogers: No notice to produce was served.

The Court: That yet can be done. You marked it for identification?

Mr. Schilz: Yes.

By Mr. Schilz:

Q. Mr. Shreffler, during the spring of 1936 did you have any further communication with Mr. Lazar concerning the sale of the Castamba Theatre?

A. I believe there was one other time a little later on that year, 1936.

[fol. 1116] Q. Were you during the spring of 1936 in touch with Mr. Lazar at any time concerning the sale of the Castamba Theatre?

A. Not sale. Lease. They wanted to lease the theatre.

Q. How often did you talk to him?

A. Two or more times, I believe. That is quite a long time ago.

Q. What did Mr. Lazar say to you and what did you say to him?

A. Well, he went to Caster & Stambaugh first, the owners of the theatre.

Mr. Rogers: I move to strike.

The Court: That is not responsive. He asked what Lazar said to you.

Q. What Mr. Lazar said to you and what you said to Mr. Lazar.

A. He was trying—he wanted to make a partnership deal with me in my theatre.

Q. And what else?

A. That is 1936 now. I think I told him at that time—I believe I told him that I was not interested, that is, I didn't want to sell; that it was my theatre and I wanted to run it.

Mr. Rogers: May I get that clarified? I understood the witness to testify he came to speak to him about a partner-[fol. 1117] ship deal and not to sell. Is that right?

Mr. Schilz: Read back the witness's answer.

The Court: He said he wanted to lease it.

Mr. Rogers: His testimony was that he came to him about making a partnership deal.

The Court: He was the lessee himself.

Mr. Rogers: There might be a partnership in the lease, may it please the Court, because he did use the word "partnership" I believe.

The Witness: Yes, sir.

By Mr. Schilz:

Q. During the 1936-1937 motion picture season what product did you have for display at the Castamba Theatre?

A. Well, 20th Century-Fox, Metro, Warners and Republic, a split deal with Republic Pictures, and I believe I had some R. K. O. at that time.

Q. Did you have Paramount?

A. Not in 1936. I anticipated enlarging my theatre and I cut down on my product deals. I anticipated enlarging the theatre in 1936 and I didn't do it.

Q. When did you first contact the branch managers of the various motion picture companies with respect to obtaining product for the 1937-1938 motion picture season for display in the Castamba Theatre?

Mr. Schilz: I direct your attention that I simply asked [fol. 1118] when he first contacted the branch managers.

Mr. Rogers: May it please the Court, I object to that, primarily, on the ground that there is no issue——

The Court: Objection sustained. Let us find out.

Mr. Rogers: There is no issue of that kind raised in the pleadings, may it please the Court. There is no such issue in the pleadings.

Mr. Schilz: I am simply laying the foundation to show that he did contact various branch managers at the beginning of 1937, for the purpose of acquiring the product for the following season.

The Court: 1937-1938?

Mr. Schilz: Yes, sir.

Mr. Rogers: There is no such issue in the pleadings.

The Court: He does not claim that there is. He claims this is laying the foundation for something.

Mr. Schilz: These are simply preliminary matters leading up——

Mr. Rogers: There is no allegation in the complaint and there is no item in the bill of particulars under which they

claim that there was any interference with him in getting product for the theatre, or that there was any restraint on [fol. 1119] him, or that he was relegated to second run.

The Court: He does not seek to establish that. The point is whether he did contact them for 1937-1938. That is the question now.

Mr. Rogers: My objection goes to the very root of it.

The Court: I will let it stand. Did you contact various of these companies here?

The Witness: Yes.

The Court: For 1937-1938?

The Witness: Yes, sir.

By Mr. Schilz:

Q. Whom did you contact?

Mr. Rogers: Then I do press my objection because there is no issue of that kind in the case.

The Court: He has testified he contacted various companies.

Mr. Schilz: Yes; and I want to establish whom he contacted and for what period he asked for product. I would like to make an offer of proof in that. We will show that he went to Fox and asked for a two or three-year contract; that he went to Paramount and asked for a two or three-year contract, and that he went to R. K. O. and asked for a two or three-year contract, knowing that if he could obtain the product for at least two or three years he would be safe [fol. 1120] in his operation of the Castamba Theatre; but that he subsequently only obtained the Fox product for three years; that the other companies confined him solely to one year; as preliminary to showing that certain threats were made to this witness by Mr. Lazar preliminary to taking over his theatre or taking over a 50% interest.

Mr. Rogers: That might be very interesting, may it please the Court, but that is not alleged in their complaint, nor is it set forth as an item in the bill of particulars.

The Court: It would depend on what he testified as to what was said.

Mr. Rogers: After all, they can only offer their proof within the issues in the complaint and the bill of particulars.

The Court: Their proof may cover things that are not directly plead.

Mr. Rogers: Except for the fact that in the request for particulars we asked them to specify what their issues were

and there is no such thing set forth in their bill of particulars as that being one of the issues in this case at all.

[fol. 1121] The Court: Is there not an issue with reference to the sale of this theatre?

Mr. Rogers: No, sir, there is not. No such issue.

Mr. Schilz: We submit that there is, your Honor. In the first place, the complaint alleges that one of the means by which the Schine defendants have acquired their monopoly and exercised the unreasonably restraint of trade in this industry has been by monopolization of product in various situations.

The Court: Do you state the various situations?

Mr. Schilz: Yes, they are set forth in the supplemental

The Court: Is this situation set forth?

Mr. Schilz: Yes, sir.

Mr. Rogers: Let us see where you have got it.

Mr. Wright: You are raising the point that it is not in there.

Mr. Rogers: I beg your pardon, that is some new kind of somersault practice.

Mr. Schilz: In the situations named in the complaint in which there have been unreasonable restraints of trade Shelby, Ohio, is listed as one of those towns, under paragraph 3 of the supplemental bill of particulars.

[fol. 1122] Mr. Rogers: What do you allege as to the restraints in Shelby? Do you allege anything as to the Castamba Theatre in your bill of particulars? I find nothing. When we ask them to allege what restraints they claim and they do not allege a restraint of this kind the proof must be excluded.

Mr. Schilz: In paragraph 5 of the supplemental bill of particulars it is alleged that the plaintiff states that the theatres acquired by the Schine defendants, which after such acquisition had been granted priority or preference over competing theatres by the distributor defendants, and the distributor defendants granting such priority and preference are respectively as follows—and under this is listed the Castamba Theatre, Shelby, Ohio, preference and protection granted by all major distributors.

Mr. Rogers: Over whom?

Mr. Schilz: As charged in the bill of complaint over——

Mr. Rogers: That is after acquisition by Schine. I wish to indicate that my observation was an accurate one. The

testimony Mr. Schilz is trying to elicit now is as to opera-
[fol. 1123] tions and situations as to the acquisition by Schine of the 50% interest in this theatre. There is no testimony yet about Schine having even acquired the theatre up to this time. When we ask him for particulars—and Mr. Schilz just referred to 4, 5 and 6 of the bill of particulars—what he says there——

Mr. Schilz: Are you reading from the bill of particulars?

Mr. Rogers: I am reading from my condensation of it. If you will follow me I think you will find what I am reading here is accurate. They asked for the——

Mr. Schilz: That is not a pleading in the case you are reading from.

Mr. Rogers: Do you want me to read it from that?

Mr. Schilz: Yes.

Mr. Rogers: All right.

Mr. Schilz: I would like you to read every situation in which Shelby is named in there. I think if your Honor reads 4, 5 and 6 of that bill of particulars you will find that that refers to the activities after Schine—by the specific language of it—after the acquisition by Schine of his interest in the Castamba Theatre. And also 7.

[fol. 1124] The Court: It says the names and locations of Schine theatres to which preference or protection is granted by the distributors.

Mr. Rogers: It can only be after Schine had the theatre. It could not be before.

The Court: That is probably clear.

Mr. Rogers: And 5 and 6 specifically state after acquisition by Schine. What provision do you claim, Mr. Schilz?

Mr. Wright: If the Court please, in order to show a preference in the theatre in Schine's hands you would have to show, as I understand it, what happened before when it was in independent hands. That is the purpose of this. He is laying the foundation to show the fact that this witness could not make two or three-year deals for that theatre, and Schine could and did get those same companies.

Mr. Homans: He does not claim in his bill of particulars that the preference was granted to Schine which this man could have before Schine acquired it. He claims that the preference was granted to Schine after acquisition over his
[fol. 1125] competing theatres, which then became Schine's competing theatres after acquisition. And in 6 he specific-

ally states the other theatres in Shelby, namely, the Opera House and the State, neither of which were owned by this witness and neither of which were acquired by Schine. In 6 the plaintiff states that the names and locations of competing theatres, over which Schine Theatres have been granted priority and preference are, namely, Opera House and State, Shelby, Ohio.

Mr. Wright: There is not any question about that. Schine obviously could not have a preference over him before Schine came into the town.

Mr. Rogers: That is not the statement that Mr. Wright made before, may it please the Court, or Mr. Schilz. They both claimed that these questions he is propounding about these negotiations prior to Schine's acquisition are directly set in issue in his complaint and the bill of particulars.

Mr. Wright: That is not so.

The Court: I think it is competent to show it as a step in what followed. It can be shown as a part of the conspir-
[fol. 1126] acy leading up to the acquisition.

Mr. Rogers: May it please the Court, they do not claim in their pleadings or bill of particulars that any steps of this kind were taken leading up to the conspiracy, or even as any part of the conspiracy.

The Court: They claim after this particular theatre was acquired by Schine that certain things were done in violation of the statute.

Mr. Rogers: Not with this theatre. Schine only got a 50% interest in this theatre.

The Court: It is alleged here in 4. It states the names of the theatres in which preference was granted by the distributor defendants.

Mr. Rogers: To whom, may it please the Court? To Schine it says there. It could not be to Schine until after he acquired his interest.

The Court: That is true.

Mr. Rogers: Therefore there is nothing in the bill of particulars setting forth that this was any step in the conspiracy.

The Court: I will receive the testimony.

By Mr. Schilz:

Q. Mr. Shreffler, have you stated the film companies that you contacted for the purpose of obtaining product for
[fol. 1127] the 1937-1938 season?

A. Yes; I went——
Q. That is all. What companies did you contact?
A. Warners, Metro.
Q. Who else?
A. And R.K.O.
Q. And who else?
A. Well, in fact, all of them.
Q. Didn't you talk to the branch manager of Paramount?
A. Yes, sir.
Q. Who was that, Mr. Shreffler?

Mr. Rogers: May we get the date, please? Mr. Shreffler can give it to us.

A. That would cover a period—that is, I can't give you a specific date. I went in every Monday into Cleveland and I anticipated adding to my theatre, and naturally, from time to time, I was looking after product to make the theatre larger.
Q. What year was that?

Mr. Rogers: The season of 1937-1938, he said.

A. I had a contract with Fox for three years. I can't tell you how that run. I believe it was a year run.

Mr. Rogers: This question was directed to Paramount.

A. I made an application with Mr. Robb of Paramount in January, 1937, that never went through. That is, it was [fol. 1128] never O.K.d by New York.

Mr. Rogers: Let us have the facts leading up to that.

Q. You made an application to Mr. Robb of Paramount, you said?
A. Yes, sir.
Q. In January of 1937?
A. I was in the carriage works at that time.

Mr. Rogers: I object to it, may it please the Court. I would like to get the date fixed. I am entitled to that. I want to know which season it was.
The Court: When did you make this application through Robb?
The Witness: In January, 1937.
Mr. Rogers: Which season was it?
The Witness: It was for a two-year deal. I think that was 1937-1938 and 1938-1939.

By Mr. Schilz:

Q. To whom else did you make application, to what other companies?

A. Well, I went to Metro.

Q. Who did you see at Metro?

A. The salesman came to Shelby every two or three weeks in his rounds.

Q. What was his name?

A. Gene Vogel.

Q. Who did you see connected with the Warner Company?

[fol. 1129] Mr. Rogers: He has not said anything about the Warner Company yet. He said Metro, R.K.O. and Paramount.

The Court: Did you have any contact with Warners' representative?

The Witness: Yes, sir.

The Court: When was it?

The Witness: 1937.

By the Court:

Q. January; at the same time?

A. Well, in the spring of 1937. I can't give any exact date.

Q. What was the talk?

A. I just wanted their product next year. That is, for two or three years, if I could get it.

By Mr. Schilz:

Q. Did you make the same application to R.K.O.?

A. Well, Mr. Greenblat was manager and I dropped in and talked to Mr. Greenblat and Mr. Goldsmith.

Q. What product did you obtain and show at the Castamba Theatre during the 1937-1938 season?

A. That was after Schine took it over. My theatre was dark in August and September.

Q. Just answer my question. What product was obtained and shown at your theatre during the 1937-1938 season?

The Court: That would be when you and Schine were [fol. 1130] operating together.

A. Yes, 20th Century, Fox, Metro, Warners', R.K.O., Republic, and one other one; Paramount.

Q. What was the term of the contracts with each of those companies?

Mr. Rogers: May it please the Court, the contracts speak for themselves. They are the best evidence.

The Court: Sustained.

Q. Directing your attention to the summer of 1937, did you have any communication with or from Mr. Lazar at that time concerning a purchase or leasing of the Castamba Theatre?

A. Yes, sir.

Q. And have you produced a letter written you by Mr. Lazar in that regard?

A. Yes. I think it is in that file. I attended an Izzy Schmertz——

Q. What was the approximate date of your communication from Mr. Lazar?

The Court: If you have the letter there that will show.

Q. Is this the letter (showing to witness)?

A. I will have to get my other glasses. There was a letter previous to this. This is one of them.

Q. This is one of the letters?

A. Yes, sir.

[fol. 1131] Mr. Schilz: This letter is dated July 3, 1937. Mark it for identification, please.

(Thereupon the letter of July 3, 1937, referred to, was marked as Plaintiff's Exhibit P-75 for identification.)

Mr. Schilz: If the Court please, I offer this letter in evidence.

Mr. Rogers: No objection.

The Court: Received.

(Thereupon the letter referred to, previously marked as Plaintiff's Exhibit P-75, was received in evidence.)

By Mr. Schilz:

Q. Mr. Shreffler, did you subsequently see Mr. Lazar in Shelby?

A. Do you mean before?

Q. After the date of this letter.

A. I believe I replied to that letter.

Q. Just listen to my question. Did you see Mr. Lazar in Shelby after July, 1937?

A. I believe not until the latter part of August or the first of September.

Q. In what connection *with* Mr. Lazar meet you and talk to you?

A. Well, he came to my carriage works' office.

[fol. 1132] Q. State what Mr. Lazar said to you and what you said to him.

A. At that time?

Q. Yes.

A. That is the latter part of August or the first of September. It was on a Tuesday. I remember that distinctly. I have the date, I believe, in one of my memorandums. He came in and he told me that Nick Dipson was coming to Shelby—or Nicholas Dipson—to put in a theatre, and that he would like to work out a partnership deal with me.

The Court: You say he said that Nick Dipson was coming to Shelby to put in a theatre?

The Witness: A new theatre, which was in a film dating I have on file there.

Q. Mr. Shreffler, who would like to work out a partnership with you?

A. He would.

Q. Who?

A. The Belkip Corporation or Schines.

Q. You mean Mr. Lazar?

A. Yes, Mr. Lazar was there trying to hook me up with his organization.

Q. What was the next conversation that you had with Mr. Lazar?

A. Naturally we talked——

[fol. 1133] Q. Just answer my question. What was the next conversation that you had with Mr. Mazar and when did that occur?

A. That same day. That is on that Tuesday. We had quite a lengthy conversation that day.

Q. What was the substance of the conversation?

A. The substance of the conversation was that I needed his organization to stay in business. That is, he said that Nick Dipson was coming to Shelby and he was very ruthless and I would be powerless, that Dipson would simply smother me.

Q. What else was said during the conversation by Mr. Lazar?

A. Well, we talked quite a long time and finally he said that they had been here several times trying to negotiate a deal with me on the theatre, and also that they were coming into Shelby.

Q. Who?

A. Schine.

Q. And what else?

A. And if this theatre went ahead that they could not make a success of it because the town was too small for two theatres.

The Court: Does that mean if your theatre went ahead?

The Witness: No, if the other theatre came to town, if Dipson came to Shelby.

The Court: Who was Dipson?

[fol. 1134] The Witness: Well, I don't know him. I never met him.

The Court: Was he connected with Schine?

The Witness: No, sir. He is another circuit operator, I believe.

The Court: All right.

By Mr. Schilz:

Q. What else was said?

A. Finally the whole thing came down that he told me, he says, "Hal, listen, we have been here several times trying to lease your theatre, and in the event that you don't sign up with us the State Theatre cannot exist with you in Shelby because the town is not large enough and to get in here we are going to buy the State Theatre and we will pay you a thousand dollars more than you can afford to pay to get it, and then we will take the product out of your theatre and you will be sitting there with a nice theatre when it is completed, and no pictures."

Q. Tell the Court what the State Theatre was that you referred to.

A. The latter part of September the store room was used as an automobile sales room. Ten minutes after that lease was signed I——

The Court: Just a moment. He asked you what the State Theatre was.

[fol. 1135] A. It was an automobile sales room.

The Court: Converted into a theatre?

The Witness: It was a store room. Then converted into a theatre.

The Court: That was running at this time in 1936?

The Witness: No, sir, it wasn't even started.

The Court: Is that the one that Dipson was coming into?

The Witness: Yes, that is the one the Film Daily said he was coming in to build a de luxe theatre.

By Mr. Schilz:

Q. Mr. Lazar also said that during this conversation?

A. Yes, sir.

The Court: You said something about Schine was coming in there?

The Witness: Schine since the theatre was going to be there and the State could not exist against the Castamba, after I got the new theatre, that the theatre was in pikers' hands, it was not opened until around October——

The Court: Your theatre?

The Witness: Yes, that was down. I remodeled the theatre from 476 to 749 seats. Then he says that would give them a right to come into Shelby.

Q. Give who a right?

[fol. 1136] A. Schine, if I didn't join up with them.

Q. Did he say in what manner they would come into Shelby

A. Well, if I didn't join up with them that they would buy the State Theatre and pay a thousand dollars more for it.

Q. Did you have a subsequent conversation with Mr. Lazar after that?

A. Yes.

Q. And where did that occur?

A. At the same place. He came back on Friday that week.

Q. What was said at that time by Mr. Lazar and by yourself?

A. He came back for my answer.

Q. Your answer as to what?

A. When he left on Tuesday I was to leave him know on Friday, and he came back on Friday.

Q. You were to advise him on Friday as to whether or not you would do what?

A. Whether I would go into their organization or not.

Q. What organization?

A. The Schine organization, as a partnership.

Q. What did you tell him on Friday?

A. Well, I decided to go in with them.

Q. Then what was done, Mr. Shreffler?

A. Well, we signed the contract. That is, the thing was all done on word of honor. I told him on Friday I would, [fol. 1137] and the contracts were not signed until September 19, I believe.

Q. Did you go to an attorney's office for the purpose of drawing contracts?

A. Yes.

Q. Who was that?

A. Long, Anderson & Green.

Q. Who was your attorney?

A. Mr. Green.

Q. Was Mr. Lazar present there?

A. Mr. Lazar took the contracts to Cleveland. Mr. Lazar had the contract. Pete Klein made them out in Cleveland and he brought them down to my attorneys to look over. That took time. Mr. Lazar was very busy.

Q. How long after the conversation you have just related?

A. I think the contract was signed on the 19th of September, if I remember right. I think that was the date. I think it was repeated here just a moment ago.

Q. Did you have any conversation with Mr. Lazar in your attorney's office concerning the terms of that contract or concerning the future Schine operation in Shelby?

A. Well, the attorneys went over the contract and they made Mr. Lazar take out one paragraph.

Q. To what did that paragraph relate?

Mr. Rogers: One moment. May it please the Court, the contract is the best evidence.

[fol. 1138] Q. Do you have the contract with you?

A. I do not.

Q. What conversation occurred between you and Mr. Lazar at that time?

A. Well, very little. I was down, to tell you the truth, and the attorneys did all the arguing. I didn't.

Q. Did Mr. Lazar make any statements to Mr. Green in your presence concerning what Schine would do in Shelby? Just answer yes or no.

Mr. Rogers: I object to that as leading.

The Court: It is leading. That is true. He may state what was said.

Q. What was said by Mr. Lazar to Mr. Green, in your presence?

A. Well, that is beyond my recollection. That is, they were arguing——

Q. Give the substance of the conversation.

A. They were arguing about the contract, that one paragraph in there.

Q. What else?

A. I couldn't say positively there was anything else said at that time, only the contract. The conversation I had was down at the carriage works with Mr. Lazar. We did go over the whole deal. I know Mr. Green was astounded when I sold——

[fol. 1139] Mr. Rogers: One moment.

The Court: Yes, strike it out.

Q. During that conference was anything said about the possible acquisition of the State Theatre by Schine?

Mr. Rogers: I object to that question on the ground that it is leading.

The Court: Have you stated all you recall of the conversation at that time?

The Witness: Yes, I believe I have.

The Court: All right. You may inquire. Was anything said about the acquisition of the State Theatre?

A. Mr. Lazar made those accusations to me at the carriage works, and they possibly may have been stated——

The Court: Then there was no talk about that at the time when the contract was signed?

The Witness: Up at the attorney's office?

The Court: Yes.

The Witness: Not to my recollection.

By Mr. Schilz:

Q. Did you ever have a conference with Mr. Lazar and your attorney in which statements were made about the acquisition of the State Theatre?

A. Yes, sir.

Q. Tell us that conversation and when that occurred.

A. It was just a repetition of what I told you Mr. Lazar [fol. 1140] said to me.

Q. I want the time and the substance of the conversation that occurred in your presence—in the presence of your attorney.

Mr. Rogers: And where? Where was this? May I have the place where this conversation took place?

The Witness: That was after we got started in the theatre.

Mr. Wright: That was after the deal was made?

The Witness: Yes, that was after the deal was made.

By Mr. Schilz:

Q. All right. What was said by Mr. Lazar in your presence?

Mr. Rogers: May it please the Court, I object to that on the ground that that surely cannot be evidence tending to show what induced Mr. Shreffler to sell his interest in this theatre.

The Court: Objection overruled. What did he say at that time? What did Lazar say at that time?

The Witness: Why, he told me that if I didn't come into the organization——

The Court: You had already come in, hadn't you?

The Witness: No, this was previous to that.

Mr. Rogers: I understood the witness to say it was after the deal was closed.

The Court: He did so state. You are talking about some [fol. 1141] talk at some time other than the time when the contract was made, when you were in the office of your attorney? You said you had another talk with Lazar about the State Theatre. When was that?

The Witness: It possibly was at that time. That is, that we talked it over with my attorney. I tried to tell Bob—I had to convince him what I was up against.

Mr. Rogers: May it please the Court, I move to strike it.

The Court: Strike it out.

Q. Just pay attention to the question, if you will, and to the questions of the Court. Did you have a conversation with Mr. Lazar in the presence of your attorney after the

first conversation with Mazar in September that you have related, but before the signing of the contract?

A. I had two talks with Mr. Lazar, on Tuesday and Friday, and Mr. Lazar submitted—had Mr. Klein draw up the contract and he told me, he says, "Hal, I want you to go over this contract, if there is anything in here that is not right we will correct it."

Q. During those negotiations on the contract did Lazar and yourself have any conversation in your attorney's office?

[fol. 1142] A. Yes, sir.

Q. Give us the substance of that conversation.

Mr. Rogers: Will you give us the date of it, too?

The Witness: That I can't do. I can't give the date.

The Court: Perhaps you can fix the date with reference to the time of the contract.

Q. Will you give us the substance of the conversation now?

Mr. Rogers: I think we ought to have the time fixed.

The Court: Fix the time as near as you can.

The Witness: It was previous to September 19th. That, I believe, is the actual date the contract was signed.

The Court: What was the substance of the conversation? What did Mr. Lazar say to you, or your attorney in your presence?

Mr. Rogers: Is this the same conversation we have been over?

The Court: I understand it is not. Your inquiry now is about some statement about the State Theatre. You testified to some conversation about that prior to the making of the contract. Now the question is whether there was another conversation you had with him on this same subject.

The Witness: Yes, there were conversations, but I can't just recall them.

[fol. 1143] By Mr. Schilz:

Q. Can you recall during the negotiations on the contract the substance of the conversation that took place in your attorney's office between Mr. Lazar and your attorney?

Mr. Rogers: This witness has twice or three times stated that he cannot recall.

Mr. Schilz: He stated there was a conversation. I am asking him if he can recall the substance of it.

The Witness: Yes.

Q. What was that conversation? What was the substance of it?

A. It was in regard to a paragraph that was in the contract.

Q. What else? Wasn't anything else said there about the operation of the theatres in Shelby?

Mr. Rogers: One moment. I object. This witness has been exhausted, I think, on that subject, and more than exhausted.

The Court: Sustained.

Mr. Richardson: May I inject this, that the conversation he is now testifying to is the same conversation where the attorneys were working over the contract with reference to this clause.

Mr. Schilz: I think Mr. Richardson is in error with respect to that.

[fol. 1144] Mr. Richardson: No, I am not.

The Court: I do not know whether he is referring to the time when the contract was actually agreed on and signed or some other time when his Counsel and Mr. Lazar were present. You spoke about one occasion when he said something about this other theatre there.

Mr. Rogers: The State Theatre.

The Witness: Since the State Theatre was going to be built, and he also stated that time, it comes to my memory, that if I would join their organization the chances were when they found out Schine was coming into Shelby they wouldn't even start it.

By Mr. Schilz:

Q. Anything else?

Mr. Rogers: When was that conversation? We haven't got that.

The Witness: That was on Friday.

Q. In September of 1937?

The Court: Before the contract was signed?

The Witness: Yes.

Q. That was in September, 1937, was it?
A. Yes, sir.

Mr. Rogers: May we get where that conversation was had?

The Witness: At the carriage works' office.

[fol. 1145] Q. When was the contract signed by which you entered into partnership with Schine?

A. September 19, I believe.

Mr. Rogers: That has been testified to two or three times now.

Q. Were you continued in any capacity in the operation of the Castamba Theatre?
A. Yes, sir.
Q. And in what capacity?
A. Manager.
Q. Now, going to another subject for a minute: Did you make any further improvements on the Castamba Theatre during the year 1937?
A. Yes, I spent over $30,000 on the theatre.
Q. When did you begin remodeling it?
A. In June.
Q. And when was that completed?
A. I believe the 28th day—well, it never has been completed. You can always add to it. We opened it on September 28th or 29th.
Q. What consideration was paid to you by Schine for participation in that theatre?
A. Mr. Lazar gave me $15,000 for half of the building cost.
Q. What was your initial investment on the theatre?

Mr. Rogers: May it please the Court, I object to that as incompetent.

[fol. 1146] Q. What was the theatre worth to you when you first took it over?

Mr. Rogers: I object to that as incompetent. The only evidence we have here now is that we got an interest in a lease; that is all.

Q. What value did you place on the theatre aside from the improvements that you had made?

Mr. Rogers: May it please the Court, that is immaterial.

The Court: Value placed when?

Mr. Schilz: In 1937.

The Witness: Before Schine bought it?

By Mr. Schilz:

Q. Before Schine bought it.

A. There was no value on it. That was mine. It was worth a million dollars to me. That is, it was not worth that, but it was all I had on earth.

Mr. Rogers: May it please the Court, I move to strike it.

The Court: Yes. Can you state the reasonable value of this property in September, 1937?

The Witness: Yes, your Honor. I didn't own the building—any part of it?

By the Court:

Q. You just had the lease?

A. Up until June 1st. Then I put $30,000 in, or more.

Q. How long a lease did you have?

A. I never had a lease.

[fol. 1147] Q. You said you didn't own the building. You didn't have a lease?

A. No, sir.

The Court: I cannot understand that.

By Mr. Schilz:

Q. On what basis did you rent the theatre?

A. I rented it from Caster & Stambaugh.

Q. Under what terms?

A. I paid them $145 a month for it up until——

Q. If you didn't have a lease was it on a month-to-month basis or a week-to-week, or what?

A. Just one of those things that went along and did business. I had confidence enough in them that they wouldn't lease to anybody.

[fol. 1148] Q. Were you renting it on a month-to-month basis then?

A. I suppose I was.

The Court: He did sign and make a lease after Schine came in.

The Witness: You see, the Schines at different times tried to get the lease away from me.

Mr. Rogers: I move to strike that.
The Court: Strike it out.

Mr. Schilz:

Q. Was Mr. Carl Stambaugh a friend of yours?
A. Yes.
Q. Was he the owner of the theatre?
A. Half owner up until I made this improvement.
Q. Do you know whether or not Mr. Lazar approached Mr. Stambaugh in 1936 and attempted to lease the theatre?

Mr. Rogers: I object to that on the ground it is hearsay and not within the witness' knowledge.
The Court: Unless he was present, sustained.

Q. Mr. Shreffler, why did you send this letter January 23, 1936 to Mr. Lazar?

Mr. Rogers: I object to that, may it please the Court, this letter that is not even in evidence, it is only marked for identification.
The Court: I don't see the materiality. This is a copy of the letter?
[fol. 1149] Mr. Rogers: Exactly, sir.

Q. It is a fact, is it not, Mr. Shreffler, that you wrote to Mr. Lazar, in January, 1936?
A. Yes, sir.
Q. What was the occasion of your writing to him?

Mr. Rogers: I object to that as immaterial.
The Court: He may answer.

Q. What was the occasion of you writing?
A. Mr. Caster gave me a letter from Mr. Lazar.

The Court: Who was that?
The Witness: Mr. Caster. He was co-owner.
The Court: From Mr. Lazar?
The Witness: From Mr. Lazar.

Q. What were the contents of the letter given you by Mr. Caster?

Mr. Rogers: Wait a moment. May it please the Court, I object to that.
The Court: Sustained.

Q. Mr. Shreffler, is this a copy of the letter handed you by Mr. Caster?

A. Yes, sir.

Mr. Schilz: Will you mark this for identification?

(Thereupon letter dated January 14, 1936, referred to, was marked as Plaintiff's Exhibit P-76 for identification.)

[fol. 1150] Q. Did Mr. Caster tell you to answer this letter?

Mr. Rogers: I object to that as immaterial.

The Court: You can show whether he did answer it.

The Witness: Yes, I answered it.

Mr. Rogers: One moment, please, Mr. Shreffler. I ask to have that stricken out.

The Court: Strike it out.

Q. When Mr. Caster handed you the letter which you have identified——

Mr. Rogers: You mean the purported copy?

Q. The copy which you have identified as coming from Mr. Lazar, did you answer Mr. Lazar directly?

Mr. Rogers: One moment. I object to the question on the ground the question is not based on the evidence.

The Court: Sustained. He has testified. I can't see it has any materiality anyway.

Q. Is this letter, January 23rd, 1936 (referring to Plaintiff's Exhibit P-76 for identification), a copy of the answer you wrote when Mr. Caster handed you the original of this letter?

A. Yes, sir.

The Court: Is that marked for identification?

Mr. Schilz: Yes, your Honor, Plaintiff's Exhibit P-76 for identification.

[fol. 1151] Q. Why did you communicate directly with Mr. Lazar?

Mr. Rogers: I object to that as immaterial, calling for mental operations of this witness, and not competent.

The Court: Oh, I don't know, it may be competent.

Mr. Rogers: It gives his mental operation about a letter that is not even in evidence. There is no evidence he ever wrote to Lazar at all.

Mr. Schilz: Oh, yes, there is.

The Court: I think you had better wait until we get the originals.

Mr. Rogers: Exactly. There are statements by Mr. Schilz, and the letters are not in. This witness cannot testify to mental operations about some exhibit not before the Court.

The Court: Just a moment. I think it will save a lot of time if we try to get the original papers instead of doing it in this way. They are the best evidence instead of spending a lot of time on copies.

Mr. Wright: I thought we had subpoenaed them, your Honor, but they were not included in the subpoena that was served, and we, of course, will subpoena those originals.

Mr. McKay: I will state to your Honor now from such [fol. 1152] search Mr. Antevil has been able to make, he has not found any such letter that is being made the subject of this controversy.

Mr. Schilz: In that case then, I believe these are competent evidence.

The Court: I did not know that. If the defendants concede these are copies of such letters, the copies would be competent.

Mr. Rogers: I cannot so concede, because my information is they never served notice to produce this particular letter.

The Court: Mr. McKay said you could not find them.

Mr. Rogers: From what we gleaned of our files. We did not make a specific search for this letter.

Mr. McKay: We have nothing to show any such letter was received up to this moment.

The Court: I sustain the objection to it.

Mr. Schilz: Mr. Shreffler, at the time of your conversation with Mr. Lazar, in September, 1937, was a newspaper article called to your attention appearing in the local paper, relative to a proposed deal with the Schine Company?

The Witness: Yes, sir.

Mr. Rogers: One moment. I object to that, on the ground [fol. 1153] that that is hearsay.

The Court: Sustained.

Q. Mr. Shreffler, did you see a newspaper article in the local paper?

A. Yes, sir.

Mr. Rogers: I object to that as immaterial.

The Court: I will let him say that he saw it, that he saw an article in the local paper.

Mr. Richardson: It might have been a baseball game.

Q. Is this the article headed "Schine Theatres——"

Mr. Rogers: Please don't read something that is not in evidence.

The Court: Ask him if that is the paper he saw.

The Witness: Yes, and I read it.

Mr. Schilz: I offer it in evidence.

Mr. Rogers: I object on the ground it is hearsay.

Mr. Schilz: Mark this for identification, rather.

(Thereupon the newspaper article, dated September 11, 1937, referred to, was marked as Plaintiff's Exhibit P-77 for identification.)

Q. Did you see the newspaper article I have shown you, marked Plaintiff's Exhibit P-77 for identification, at approximately the same time Mr. Lazar was having the conversation with you?

[fol. 1154] Mr. Rogers: Which conversation? He has talked about a number of conversations.

Mr. Schilz: The first September conversations.

The Witness: No, that came out the next day after I gave my word to——

The Court: You have answered it.

Mr. Schilz: I offer this in evidence.

Mr. Rogers: I object to that again on the ground it is hearsay and not binding on the defendants.

The Court: Sustained.

Mr. Wright: Wasn't the owner subpoenaed?

Mr. Schilz: Yes, the owner was subpoenaed.

Mr. Wright: As I understand it, if the Court please, the owner of the newspaper who is also the owner or part owner of the theatre building was subpoenaed to appear, but was ill, and unable to be present, and we will have——

Mr. Rogers: Even if he were he couldn't make incompetent evidence competent.

Mr. Schilz: If the Court please, I was offering this newspaper article to show——

The Court: Well, that is incompetent now.

Q. Was a corporation formed to take over the Castamba Theatre when you made your contract with the Schine group?

A. Yes.

[fol. 1155] Q. What is the name of that corporation?

A. Schine Shelby Corporation.

A. Do you have an interest in it?

A. It was represented to me to be a partnership. I own 50 per cent of the stock.

Q. Did that corporation make a contract with you to manage the theatre?

A. Yes, sir.

Q. Under that contract, what salary do you receive?

A. Well——

Mr. Rogers: That is immaterial, may it please the Court.

Mr. McKay: Where is the contract?

The Court: I don't see how it is material.

Q. Do you receive a salary under that contract?

A. Yes, sir. $50.

Q. $50 what?

A. A week.

Q. Did that corporation make a contract to book the pictures for the theatre?

A. Yes, sir.

Q. And what is the nature of that arrangement?

Mr. Rogers: May it please the Court, that is immaterial. Might I also state that Mr. Schilz has now gone far beyond any of the issues as far as this town is concerned, both [fol. 1156] under his complaint and his bill of particulars. None of this has been made an issue.

The Court: State what he does, what was done and by whom, about it.

Q. Who books the pictures for the theatre, Mr. Shreffler?

The Court: After you became manager?

The Witness: After I became manager?

The Court: Yes.

The Witness: It was booked out of Cleveland. I don't know the man's name, but it was the Belpik Theatre Corporation.

Q. Mr. Shreffler, before the Schine group took over operation of the Castamba Theatre, on what policy did you play pictures?

Mr. Rogers: I object to that as immaterial.

The Court: I don't know what you mean by what policies?

Mr. Schilz: If the Court please, as I understand it, in this industry they characterize playing single features or double features as poliey of playing pictures.

Mr. Rogers: May it please the Court, this examination has proceeded along lines that are not presented as issues in this case.

Mr. Schilz: I withdraw the question and will restate it in this way:

[fol. 1157] Q. Did you — double feature pictures in the Castamba Theatre before the Schine group took over?

Mr. Rogers: May it please the Court, that is not pleaded in the complaint or the bill of particulars or in the cause of the action in the bill of particulars.

Mr. Schilz: It will become pertinent.

The Court: Overruled. Answer, Mr. Shreffler.

The Witness: Very seldom. State the question again.

Q. Did you play pictures in the Castamba Theatre on a double-feature policy prior to the Schine operation?

A. Very seldom.

Q. What occurred in that regard after Schine took control?

Mr. Rogers: I object to that, may it please the Court, not within the complaint or bill of particulars, not within the issues.

The Court: Overruled.

Mr. Rogers: And also object to the question on the ground it presumes to state facts not proved, the question is framed along lines, "After the Schines took control". The witness' testimony is they were each 50 per cent owners of the theatre.

Mr. Schilz: I would like to state to the Court this will become——

[fol. 1158] The Court: Go on.

Q. Just answer the question, Mr. Shreffler. What occurred in that regard after the Schine Corporation took control of the theatre?

Mr. Rogers: I object to the form of the question.

The Court: After the Schine Shelby Corporation took possession.

Mr. Rogers: Exactly, sir, but he says "After Schine took control".

The Court: What was the policy in reference to double features after Schine Shelby Corporation took control?

The Witness: My theatre being down two months, we accumulated a lot of product they had to play, so we had to double-feature to get caught up on the product. We never in the history of the Castamba even before or after Schine took it over ran a double feature on Sunday. During the week we did it to get the product up to date. We wanted to get current with the rest of the towns around Shelby.

Q. During the year 1939, did you confer with Mr. Kemper relative to the purchase of the State Theatre?

A. No, sir.

Q. During the year 1939, did Mr. Lazar ask you to make [fol. 1159] inquiry as to the purchase of the State Theatre?

Mr. Rogers: I object to that on the ground the question has been answered, and second, on the ground the question is leading.

Mr. Schilz: This is a different question, Mr. Rogers.

Mr. Rogers: I object to this one on the ground it is a leading question.

Q. During the year 1939, were you requested by Mr. Lazar——

Mr. Rogers: I object.

The Court: You object on the ground the question calls for a conclusion?

Mr. Rogers: Exactly.

Mr. Schilz: Withdraw the question.

Q. Mr. Shreffler, do you have the agreement with you that you made for the operation of the theatre?

The Court: As manager, you mean?

The Witness: As Manager?

Q. As manager, yes.

A. No, my attorney has that.

Q. But you were subpoenaed to produce that, were you not?

A. If I did, I didn't bring it.

Mr. Schilz: Do you have it, Mr. McKay?

Mr. McKay: I don't think you subpoenaed us to produce it, did you?

Mr. Schilz: Yes.

[fol. 1160] The Witness: If they be in the file, I don't know. Mr. Green was called to California on a very pathetic case. He would like to have been here, but——

Mr. Rogers: I move to strike.

The Court: Counsel, you have the file right in front of you.

Mr. Rogers: Why don't you hand him his file and see if he has got it?

Mr. Wright: It was also subpoenaed, if the Court please, from the defendants.

(Mr. Schilz hands papers to the witness.)

Mr. Wright: It does not make any difference which copy goes in.

Mr. McKay: What is it you want? The employment contract with Mr. Shreffler? Is that what you want?

Mr. Wright: Yes. The subpoena, I believe, calls for all contracts.

The Court: He is trying to find it, Mr. Wright.

The Witness: I didn't even see it since I signed it.

Mr. Schilz:

Q. Do you have any other papers with you in which you would have that employment contract?

A. No, sir.

[fol. 1161] Mr. Schilz: Your witness, Mr. Rogers.

Mr. Rogers: While looking for that contract—I believe this is the one.

Mr. McKay: The date of the month is left out, but it bears his signature.

The Witness: May I see that, please, when you are through.

(Mr. Schilz hands papers to the witness.)

The Witness: Yes, that was for two people, that was for my son and I. We got $50 for running the theatre.

The Court: $50 together?

The Witness: Yes.

The Court: That is the contract you spoke about that you made with the Schine Shelby Corporation?

The Witness: Yes.

Mr. Rogers: In which he was half owner?

The Witness: Yes.

Mr. Schilz: I would like to offer the contract in evidence.

(Thereupon the contract referred to, was received in evidence and marked was Plaintiff's Exhibit P-78.)

Mr. McKay: May I call your Honor's attention to one thing? In view of the fact capital seems to have been [fol. 1162] made over the fact it is with Mr. Shreffler and his son, the contract agrees the son does not have to render any services. He may withdraw and does not affect the compensation.

The Court: I don't know what significance the contract has.

Mr. Rogers: Neither do I, but it is in.

The Court: I don't know just what significance it has, but the contract shows for itself.

Mr. Schilz: I would like to make this statement to the Court: In view of the objection that has been made here this morning as to Schine indirectly having an interest in the local theatre corporation, I assume that the Court some time during these proceedings will have the deed to the property, that the Court may pierce the corporate veil in a situation of this character.

Mr. Rogers: That is very curious. We are having res gestae and piercing veil in a situation where they do not apply.

The Court: We will recess until 2 o'clock.

(Whereupon, at 12:35 o'clock p.m., a recess was taken until 2 o'clock p.m.)

[fol. 1163] After recess, 2 o'clock, p.m.

Appearances: As before noted.

Mr. Rogers: Before proceeding with the cross-examination of this witness, I respectfully request that I am entitled to a ruling by this Court that the witness on the stand has evidenced neither hostility nor is the witness an adverse witness, but on the contrary, has showed every evidence of co-operating with the plaintiff in the adducing of evidence, and that the claim of this witness being an adverse witness

is entirely unfounded and that they are not entitled to the benefit of any such ruling.

The Court: The testimony shows for itself. The only question I can see now is whether he is an adverse witness or not.

Mr. Rogers: The plaintiff claims he was entitled to a ruling by your Honor.

The Court: I did not pass on it. I told him to proceed with his examination, that would develop the question of whether he was or was not an adverse witness. The question was not raised.

[fol. 1164] Mr. Rogers: I am raising the question now, may it please the Court, after the direct testimony is in.

The Court: I refuse to rule one way or the other, because I don't know. In the first place, the Government claims he is an adverse witness.

Mr. Wright: We are charging within the language of the rule.

The Court: That is for the purpose of cross-examination.

Mr. Rogers: No, sir, for the purpose of direct examination, sir.

The Court: Well, if it was developed he was an adverse witness for the purpose of examination by either party on either examination.

Mr. Rogers: They raised that under Rule 43, and I think it proper, your Honor could not rule properly at that time.

The Court: The questions and the answers will show for themselves.

[fol. 1165] HALMER D. SHREFFLER resumed the stand on behalf of the Plaintiff and testified further as follows:

Cross-examination.

By Mr. Rogers:

Q. It is my understanding, Mr. Shreffler, that you testified that some time around January of 1937, you went to the distributor companies among them being Metro, Warner, R.K.O., Republic, Fox and Paramount trying to get franchise agreement, is that right?

A. Yes, contracts, to have in my theatre when I expected to remodel in that summer, because I wanted to be secure with product.

Q. Have I correctly named all the companies you went to trying to get franchise agreements at that time?

A. Well, in fact, I think so. I will put it this way, that I went to all except United Artists, Universal, and Columbia. The other concerns I used. If there are any I missed there——.

Q. No, I don't think you have missed any, Mr. Shreffler; but you did go to Metro at that time in 1937?

A. Yes, a salesman came through Shelby and I talked to him about it.

[fol. 1166] Q. I mean about getting franchise agreements; is that right?

A. I wouldn't say all franchise agreements. Just contracts.

Q. Which companies did you go to? I understood that Mr. Schilz was examining you about the companies you went to to get franchises.

A. Yes, the ones I was most interested in was 20th Century-Fox and Metro. I had one from 20th Century-Fox.

Q. Do you mean in 1937 you went to 20th Century-Fox trying to get a franchise agreement for your theatre?

A. Well, I had one in existence at that time.

Q. Now, it is your recollection that you actually did have a franchise contract with Fox in existence in 1937?

A. Yes, that expired, I think—I think that run one year, if I am right, into the Schine deal.

Q. You mean that franchise agreement with Fox ran only one year?

A. It ran three years, but I had practically used a year and a half of it.

Q. Then let me get this thing straight. I want to know if this is a fact, that in 1937, the spring of 1937, you already had a three-year franchise agreement with Fox; is that right?

A. Yes. It expired——

Q. One moment.

The Court: How do you distinguish a franchise agreement?

[fol. 1167] Mr. Rogers: I am going to give you that in a moment, your Honor. I just want to develop one little line and then I will come back to that, your Honor.

Q. What seasons did that franchise agreement cover, if you recall?

A. It started from the first of August or the first of September——

Q. I am asking you which three seasons did the franchise agreement cover, that one you had with Fox I mean.

A. Well, if it run one year starting in October——

Q. Don't say "if." If you don't remember, tell me you don't remember.

A. Yes, I do remember. When the first of September came around in 1937 I had two years of that franchise.

Q. Will you please tell me which seasons it covered? That is a simple question.

A. It will be possibly—correct me if I am wrong—it would be 1935-1936, 1936-1937 and 1937-1938.

Q. Now I want to ask a very interesting question. Will you please explain to his Honor what in the motion picture industry a franchise agreement is commonly known as and commonly described as being?

A. Well, it is a contract that I will be assured the pictures for two or three years of time in my theatre. I know I [fol. 1168] have got the pictures.

Q. As a matter of fact, isn't a franchise agreement an agreement between a distributor and an exhibitor under which the distributor agrees to give the exhibitor product for a period of more than one year?

A. Yes, that is right.

Q. Isn't that right?

A. Yes.

Q. Now let me show you this photostat, and I ask you whether that is a photostat of the franchise agreement between you and 20th Century-Fox Film Corporation, about which you have just been testifying?

A. I never read one clean through in my life.

Q. Pardon?

A. Yes, this is. This is my signature.

Q. That is the one, isn't it?

A. Yes.

Q. And after looking at that paper will you tell us what seasons are covered by that agreement?

A. It is so long since I have looked at one of these.

Q. See if I can't help you (indicating).

A. Commencing with 1936-1937.

Q. That is right, isn't it?

A. That is right. I was just a year off. I couldn't remember that.

[fol. 1169] Q. I know. I just asked you if you couldn't remember it, that is all. So that this franchise agreement that I just showed you is the franchise agreement about which you have testified, isn't it?

A. Yes.

Q. And this one provides for three years for the seasons 1936-1937, 1937-1938 and 1938-1939, doesn't it?

A. That is right.

Q. Looking at that paper, will you tell us when you made that agreement?

A. On the 27th day of April, 1936.

Q. So that when you testified that in 1937 you went to Fox trying to get a franchise agreement that testimony was not accurate, was it?

Mr. Schilz: I don't believe that was his testimony, Mr. Rogers.

Mr. Rogers: That is what my notes show.

Mr. Schilz: The testimony was that he went to Paramount and others.

Mr. Rogers: I beg your pardon. That is not my notes.

The Court: I think he said he went to Fox.

Mr. Rogers: He said he went to all companies. He said he went to Fox, Metro, Warners, R.K.O., Republic and Paramount.

Q. Then, if you so testified about going to Fox in 1937 [fol. 1170] to get a franchise agreement, that was not accurate, was it?

A. I was mistaken. That is, in a way—that is, I might have talked to Mr. Schmertz.

Q. You mean you were talking to him about a franchise and you had a franchise that still had two years to go?

A. It could have been.

Q. You say that could have been?

A. Yes.

Mr. Rogers: In order that there may be no question about the document I was interrogating him about, will you kindly mark it for identification?

(Thereupon the distribution agreement covering Castamba Theatre, between 20th Century-Fox and H. D. Sheffler, Shelby, Ohio, referred to, was marked as Defendants' Exhibit D-39 for identification.)

By Mr. Rogers:

Q. In order to clarify a few points: You took over the Castamba Theatre originally when?

A. In 1922.

Q. And at that time was there any other house in Shelby?

A. Yes.

Q. Which house was that?

A. The Opera House.

[fol. 1171] Q. And was that being operated as a motion picture theatre?

A. Yes, sir.

Q. Who operated it?

A. Allwein & Shreffler.

[fol. 1172] Q. Did you ever take it over?

A. The partnership did.

Q. You did?

The Court: He said the partnership. What partnership?

The Witness: Allwein & Shreffler.

The Court: What?

The Witness: This is back in 1922.

The Court: You said the partnership took it over.

The Witness: Allwein & Schreffler. I had a partner and he died in 1929.

Mr. Rogers:

Q. Then when you took over the Castamba, how many seats were in the house?

A. 476.

Q. And how long did those 476 seats remain in the house, from what year to what year, approximately?

A. That is you mean—those 476 seats stayed there until 1937.

Q. And that was until the summer of 1937, is that right?

A. After the first of June.

Q. And it was in the summer of 1937 you started to alter the house to make a seating of approximately 800 seats out of it?

A. 749.

Q. 749 seats?

[fol. 1173] A. Yes, sir.

Q. Due to that you had extended back and widened it as well?

A. Just one way.

Q. One way, extended it back?

A. No, to the right.

Q. You widened it?

A. Widened it from 28 feet to approximately 46.

Q. And while that operation was going on the house was not operating, was it?

A. No, sir—well, it operated. I think the last day I operated was a little after August first.

Q. And then from August first, when you started to remodel the house, it remained dark. That is, there were no shows being given in it?

A. No shows.

Q. Until what date?

A. I think we opened September 28th or 29th. I can't just——

Q. That is of the same year?

A. Yes, sir.

Q. During that period when the house was closed and you were doing your alterations, you were under contract to play a number of feature pictures with all of the companies, weren't you?

[fol. 1174] A. Yes, sir.

Q. And it was only by reason of the fact that the house was not operating that you could not play the pictures?

A. That is right.

Q. So that when you opened the house you found yourself with an accumulation of pictures on hand that you had not played as yet and you were anxious to play those pictures?

A. That is right.

Q. And you were anxious to play those pictures in order to catch up?

A. That is right.

Q. With your season's product?

A. That is right.

Q. And to play the next season's product in a timely, current manner?

A. Yes, sir. That is what we were trying to do.

Q. In order to do that you then played double features in order to catch up on the product with which you were behind, is that it?

A. Yes, sir. Can I ask a question? That is the way I stated it this morning?

Q. I believe you did. It was a little obscure.

The Court: That is your testimony?

Q. That is the fact, though, isn't it, Mr. Shreffler?

[fol. 1175] A. Yes, sir.

Q. That is what I wanted to adduce as the fact, and that was the fact?

A. Yes, sir.

Q. Didn't you, as a matter of fact, you knew who the Dipson Circuit was, didn't you?

A. No, I didn't. That is, I heard of them. I read it in the film daily, that's all.

Q. From trade sources you knew the Dipson Circuit was a rather important circuit of theatres, didn't you?

Mr. Schilz: He said he doesn't know, Mr. Rogers.

The Witness: Well, I just saw Mr. Dipson's name in the paper. That was all. I didn't know anything but Cleveland and Shelby. That is the only place I went.

Q. You say that is all you knew about the Dipson Circuit, is that right?

A. Well, up until that time. Then I found out afterwards who Dipson was.

Q. When did you find out who Dipson was?

A. I asked different film salesmen.

Q. When?

A. After. I believe I wrote a letter to a man to find out who Dipson was.

Q. Do you remember when that was?

[fol. 1176] A. It was shortly after Mr. Lazar was there.

Q. That was in 1937?

A. Yes.

Q. Was that before you put the improvement in your house?

A. It was in the process.

Q. While that house was in process your house, the Castamba, was in process of improvement and being enlarged?

A. That is right.

Q. That you made inquiry and discovered who Dipson was?

A. After September 1st of that year.

Q. After those inquiries and discussions of who the Dipson Circuit was and who they were?

A. That don't worry me much.

Q. No, but I asked you if you discovered they were a rather important circuit of theatres operating in the Middle West, did you?

A. I can't recall that.

Q. Don't you remember?

A. Yes, I did. I heard they were pretty powerful.

Q. Yes. You also knew at that time that the Schine people had nothing whatever to do with Dipson, didn't you?

A. No, I didn't. I didn't have anything to do as far as——

Q. You knew they were not in any manner connected with Dipson, didn't you?

A. As far as I knew.

[fol. 1177] Q. Mr. Lazar never told you that the Schine people had any connection with Dipson, did he?

A. He had trouble with Dipson.

Q. Yes. He told you that they were keen competitors, didn't he?

A. Yes, sir.

Q. After you formed this Schine Shelby Corporation and, as you testified, you had 50 per cent of the stock in the company and the Schine people had 50 per cent of the stock in the Company, you went on together under that co-partnership?

A. Yes.

Q. From the time you made it down to the present time, is that right?

A. Yes, sir.

Q. Do you remember after that relationship had been established between you and Schine that you and Meyer Schine had some differences, talks, about some dissatisfaction on your part, and Mr. Schine said to you, "Well, if you are not satisfied, all you have to do is to give me back what I actually paid for the stock and you can have this stock back, and I will get out of town," is that right?

A. It meant—wait a minute. On July 8th, 1938.

Q. Didn't that occur on July 8th, 1938?

[fol. 1178] Q. That was when Mr. Lazar and Mr. Silverman came to my theatre.

Q. Please answer my question.

Mr. Schilz: Let him explain, Mr. Rogers, you opened it up.

Mr. Rogers: I don't want any explanation. I want an answer to a question.

Q. Didn't you have a talk with Mr. Meyer Schine about July?

The Court: Reframe the question.

Mr. Rogers: I will reframe the question. About July 8th, 1938, in which Mr. Meyer Schine told you, in substance or effect, that if you were in any manner dissatisfied with your 50-50 relationship with the Schine people, he was perfectly willing for you to give him back just what he invested, and he would give you the stock back, and he would get out of the town, and the theatre would be yours entirely, isn't that what happened?

The Witness: Not exactly. I will tell you what exactly happened. That was in Columbus.

Q. You say that didn't happen?

A. Not exactly like that. I will tell you.

Q. One moment. In substance didn't Mr. Schine tell you [fol. 1179] at that time that if you were dissatisfied, so matter what reason there was for dissatisfaction, that all you had to do is give him back what he invested, and he would give you the stock back and he would step out of the theatre. Isn't that what happened, in substance?

A. Yes, he offered the theatre back to me.

The Court: He said he offered the theatre back. The question was did he offer to give it back, and get out of town?

The Witness: That is, I don't remember that. This was at Columbus, at a managers' meeting, and if you will allow me, I will explain that.

The Court: I didn't know whether it was covered.

Mr. Rogers: Yes.

Q. You stated that up to the time the Schine Shelby Corporation was organized you had no written lease of any kind, you were in there practically from month to month, is that right?

A. That is right.

Q. And after the Schine Shelby Corporation was formed, then a written lease was obtained, wasn't it?

A. Yes, the Castamba Realty Company.

Q. And all of the Schine Shelby Corporation had was a lease on that theatre, isn't that right?

A. Yes.

[fol. 1180-1181] Q. It did not own the real estate?

A. No.

Q. Did not own the building?
A. No, sir.
Q. Just had the lease?
A. Yes, sir.

The Court: And equipment?

Mr. Rogers: I mean as far as real estate is concerned. I am talking about so far as real estate is concerned, it had a lease.

Q. The Schine Shelby Corporation,—by the way, did the Schine Shelby Corporation own the equipment in the theatre, or did the landlord own the equipment?
A. Well, it was fixed up. I owned part of it and they owned part of it.
Q. In other words, part of the equipment was owned by the landlord and part of the equipment was owned by the Schine Shelby Corporation?
A. No, that is previous to the Schine Shelby Corporation. After that——
Q. I am talking now, Mr. Shreffler, about when the Schine Shelby Corporation was organized and took over the lease. At that time I mean.
A. O. K.
Q. Was the equipment owned by the landlord or was the equipment owned by the Schine Shelby Corporation.
A. If you will allow me to explain it.

[fol. 1182] Mr. Rogers: Go ahead.

A. When Mr. Lazar—he gave me $15,000 for half of the building. He made that price himself.
Q. When you say "half of the building" just what do you mean by that? You said they didn't own the building.
A. Well, that is half of the building cost that I put into the theatre.
Q. In other words, when you made this improvement the improvement cost about $30,000; is that right?
A. Yes.
Q. And when you made the deal the deal was that inasmuch as it would cost you $30,000 if you would put in $15,000 Schine would put in $15,000?
A. No, I wouldn't just say that was right. He gave me ——that is the way we arrived at the deal.
Q. You arrived at a deal and you based the improvement cost on $30,000?

A. That is right.

Q. And you asked him to give you $15,000 toward that price?

A. He gave that.

Q. I am saying, you agreed on that as being the price?

A. Yes.

Q. And they gave you the $15,000?

A. That is right.

Q. Prior to the improvement of that theatre what rent [fol. 1183] were you paying for the smaller theatre, the 454-seat theatre?

A. $145.

Q. A month?

A. Yes, sir.

Q. When the improvement was made was the rent increased under the lease?

A. I agreed before they ever started to build the building to give Caster & Stambaugh $250 a month rent.

Q. There is no question about that, that that was the rent you agreed to pay them? That was the rent you put in the lease and that was the rent you paid?

A. Yes.

Q. It is my recollection that you testified that this theatre was all you had in the world and that you depended entirely on this theatre for you livelihood; is that right?

A. Oh, no. No, that is——

Q. Don't you remember so testifying? That is what I want to know.

A. If I did it was unintentional because I had another business at that time.

Q. That was unintentional?

A. Yes.

Q. And you didn't mean it when you said it; is that right? [fol. 1184] A. Oh, no, no.

Q. You didn't mean it, you say?

A. I liked the show business better than I did the carriage business.

Q. That is not what I am asking you?

A. I will apologize if I made a misstatement. I didn't mean it that way.

Q. You didn't mean it that way and that was not what you intended?

A. No, sir.

Q. As a matter of fact, is it your position that you depended for a large part of your income on this theatre, the Castamba Theatre?

A. Yes; it was a much better, more profitable business. I run that carriage business for my mother, who was quite old.

Q. I am talking at this time about the Castamba Theatre, not about the carriage business.

A. Yes, I made money in the show business.

Q. And you depended upon the Castamba Theatre to give you a substantial part of your income; isn't that right?

A. That is right.

Q. Let me ask you something: Is this letter in your handwriting? Just your handwriting, and that is all I want to find out.

[fol. 1185] A. Yes, it is.

Q. Is that your signature?

A. Yes, sir.

Mr. Rogers: I offer it in evidence.

(Thereupon the letter from H. B. Shreffle to Louis Lazar, dated January 27, 1936, referred to, was received in evidence and marked Defendants' Exhibit D-40.)

Q. Now I wish to read to you from Defendants' Exhibit D-40 just one sentence: "If you remember I do not depend on the show business"——

Mr. Schilz: Mr. Rogers, can't we have the whole letter?

The Court: It is all in evidence.

Mr. Rogers: It is all in evidence.

Q. "If you remember, I do not depend on the show business as livelihood, but simply a nut," with the word "nut" quoted.

A. That is right.

Q. You remember that being in the letter, don't you?

A. Yes, sir.

Q. When you said "nut" just what did you mean by this word "nut"?

A. Well, I was just a crazy nut for the show business all my life, ever since I have been a boy eight years old. I loved it. I have been whipped to stay away from the wicked show [fol. 1186] people by my father.

Q. Did you mean that you referred to yourself as a nut?

A. Well, that- a show man's expression. In other words, I was crazy about this business.

Q. Let me ask you this: Wasn't there another showman's expression about the word "nut"?

A. I don't recall it.

Q. Don't you ever recall——

A. Oh the nut, the expenses, the nut on the house.

Q. That is right. And didn't the "nut" in showman's parlance mean just making the bare expenses of the running of the house? Isn't that right?

A. I didn't mean it that way.

Q. No, I am asking you if that is not what it meant in the showman's parlance.

A. Yes, that is what it may mean in the show business, but not the way I mean it.

Q. In other words, you didn't mean you were running the house just to make the bare expenses, but you meant it to describe yourself as a nut?

A. Well, I——

Q. Is that what you mean?

A. Certainly.

Mr. Rogers: That is all.

[fol. 1187] Re-direct examination.

By Mr. Schilz:

Q. During the various conversations you had with Mr. Lazar what profit did he guarantee you from your association with the Schine Corporation?

Mr. Rogers: May it please the Court, we are not trying out a breach of contract case between Mr. Shreffler and Mr. Lazar and I object to it as incompetent.

The Court: What was said may be competent.

Mr. Rogers: Even then I doubt if it would be competent, your Honor.

The Court: Find out when it was said.

By Mr. Schilz:

Q. Did Mr. Lazar at any time during 1937 tell you that association with the Schine Corporation would give you a certain profit?

A. Yes, sir.

Mr. Rogers: One moment, now.

Q. What time during 1937?

Mr. Rogers: That is another story.

A. On September——

Mr. Rogers: Pardon me just a moment.

Mr. Schilz: You went into the matter of income, Mr. Rogers.

Mr. Rogers: Excuse me, I didn't go into income at all. [fol. 1188] I merely asked him what he meant by the word "nut". That is all I asked him. And he said it didn't mean income, so that I didn't go into income.

The Court: Whether it did or whether it didn't, I will permit him to answer as part of the conversation prior to the contract, the conversation with Mr. Lazar. Let the witness state what was said.

Mr. Rogers: My point is that if this is a conversation between Mr. Lazar and Mr. Shreffler before the making of the contract under which they formed this corporation, then it surely is merged into the written agreement and in the document.

The Court: If it was a statement that he would make a profit by doing this——

Mr. Rogers: If it was merely a statement that he would make a profit it surely is incompetent.

The Court: It is not competent in so far as it relates to your cross-examination. It is on the re-direct.

Mr. Rogers: Furthermore, your Honor, may I respectfully suggest that it is not even competent on the issues raised under the issues pleaded. There is no such thing claimed, [fol. 1189] either in the complaint or in the bill of particulars or even remotely suggested. Ordinarily, your Honor, I should have claimed surprise and asked that this witness's cross-examination be deferred because there has not been a single question propounded here of any importance that went to the conduct after Schine entered into this situation.

Mr. Schilz: If it will save time I will withdraw the question.

By Mr. Schilz:

Q. Mr. Shreffler, will you tell the Court, give the explanation of your conversation with Mr. Schine at the

Managers' Convention in Cleveland, that you wanted to give?

Mr. Rogers: I object to this witness giving any explanations.

The Court: He can give a conversation. Explanation is a conclusion.

Q. You have testified that Mr. Schine offered to buy back your theatre. What else did he say at that time and what did you say, if anything?

Mr. Rogers: I object to that question on the ground it is leading and it calls for a conclusion.

[fol. 1190] The Court: He has not concluded his question.

Mr. Rogers: I thought he had.

Q. What else did Mr. Schine say at that time, if anything, and what did you say?

A. Mr. Schine asked me if I would like to buy the theatre back and I said no. That was at the Managers' Convention in Columbus. I referred him back to when Mr. Lazar and Mr. Silverman were in Shelby. I know Mr. Lazar felt very badly and so did I.

Mr. Rogers: I move to strike that.

The Court: Strike it out.

Q. What else did you say to Mr. Schine at that time?

A. I merely told him that we were going to try and put the theatre over, that Mr. Lazar and Mr. Silverman and I thought I could get $3,000 by the first of January, 1939.

Mr. Rogers: Now, I move to strike that.

The Court: Read that answer.

(Last answer read.)

Mr. Rogers: I move to strike that as not competent.

The Court: What do you mean profit—$3,000?

The Witness: Yes, profit. That is, in other words, there was a lot of water that had went over the dam, and I said, "Well, let's all get together now and we will go to town." [fol. 1191] I tried my best——

The Court: Strike it out.

Q. At that time did Mr. Schine offer you any definite terms of purchase?

A. No, sir, there was no price mentioned.

Mr. Rogers: There was no testimony about purchase. It was sell.

Mr. Schilz: Well, Mr. Schine would be purchasing, would he not?

Mr. Rogers: No, Schine would be selling, not purchasing.

Mr. Schilz: That is all.

Re-cross-examination.

By Mr. Rogers:

Q. Did I understand you to say that Mr. Schine made you the same offer later, in Gloversville?

A. No.

Mr. Rogers: That is all. May it please the Court, I wish to make a motion to be effective as of the close of Mr. Charnas' testimony and also the close of Mr. Shreffler's testimony, to strike all of the testimony on the ground that there has been no connection whatever, that there has been no proof of authority, that the testimony [fol. 1192] refers entirely to local transactions, and on the ground that the testimony is not binding.

The Court: Denied.

Sergeant Richard T. Kemper, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schilz:

Q. What is your present address, Sergeant?

A. Well, I am assigned to Mitchell Field, First Air Force.

Q. What was your occupation before you went in the Army?

A. I was operating a theatre.

Q. Where were you operating a theatre?

A. In Buffalo.

Q. Did you ever operate theatres any place else at any time?

A. Yes, sir.

Q. Directing your attention to the year 1937, where were you operating theatres at that time?

A. In the latter part of 1937 I opened a theatre in Shelby, Ohio.

Q. What was the name of that theatre?

A. The State Theatre.

Q. What other theatres were operating there at that time?

[fol. 1193] A. When I first went to Shelby the Opera House was the only one operating. The Castamba was closed.

Q. How many seats and what was the capacity of the State Theatre?

A. 454.

Q. When did you actually open the theatre?

A. I believe it was the day before Thanksgiving, 1937.

Q. What efforts, if any, did you make to obtain motion picture product prior to the opening of the State Theatre for use in that theatre?

A. Well, I contacted the exchange managers in Cleveland of Universal, United Artists, Columbia, 20th Century-Fox, Paramount, R. K. O. and Metro.

Q. What product was sold to you for the 1937-1938 season?

A. Universal, United Artists and Columbia.

Q. Were you assured of any other product?

Mr. Rogers: One moment. I object to that as calling for a conclusion.

The Court: Sustained.

Q. What efforts did you make, if any, to obtain the R. K. O. product?

A. Well, at the time I opened the State Theatre the Opera House was running several days a week, running R. K. O. product, and I understood they weren't doing so well.

Mr. Rogers: One moment. I move to strike "I under-[fol. 1194] stood they weren't doing so well", as calling for a conclusion and not responsive.

The Court: Strike it out.

The Witness: I was informed——

Mr. Rogers: Strike it out.

The Court: He is asking you for a conversation.

Q. My question is: What efforts, if any, did you make to obtain the R. K. O. product?

A. I contacted Mr. Greenblat, who was the R. K. O. exchange manager in Cleveland, regarding the R. K. O. product.

Q. At what time did you contact him?

A. I contacted him prior to opening the State Theatre, and at that time he had a customer,——

Mr. Rogers: May we get a date? I move to strike out the answer.

Q. When was it?

A. The latter part of August, 1937.

Q. What did Mr. Greenblat tell you?

A. That he had a customer at that time at the Opera House.

Mr. Rogers: I object to this on the ground that no proper foundation has been laid; that there is no evidence of the authority, and not binding on the defendant.

The Court: There has been testimony of Mr. Greenblat's connection with the producer.

[fol. 1195] Mr. Rogers: That is right, but I am still raising my objection.

Mr. Schilz: There has been some considerable testimony that Mr. Greenblat is the branch manager of R.K.O., or was at that time, in Cleveland.

The Court: Had you dealt with this man Greenblat before in the motion picture business?

The Witness: Yes.

The Court: Over how long a period of time?

The Witness: I had known him through my association with Dipson, with the Dipson Theatre, where I was formerly employed, in Wheeling, West Virginia, and at East Liverpool, Ohio.

The Court: For what period of time, how many years anyway—several years?

The Witness: Directly about 1934.

The Court: Overruled.

By Mr. Schilz:

Q. What did Mr. Greenblat tell you as to the possibility of obtaining the R.K.O. product for use in the State Theatre during the 1937-1938 motion picture season?

A. He told me that the product was sold to the Opera House, that the customer was unsatisfactory, they had been

having a bit of difficulty with the operators of the Opera House, and that if I could make an arrangement to take [fol. 1196] over the Opera House that he would let me have the R.K.O. product.

Q. Did he tell you at that time how many feature pictures would be involved in that?

A. I don't recall him saying the exact number. We talked about it—which I wanted for the State Theatre.

Q. After you opened the State Theatre did you make efforts to make the suggestive arrangement with the operator of the Opera House?

A. Yes, I contacted the lady who was operating the Opera House and had several conversations with her, and she was not too pleased with her own operation——

Mr. Rogers: One moment. I move to strike.

The Court: Strike it out. You contacted the lady that operated the Opera House?

The Witness: Yes, and she was willing to consider an arrangement.

Mr. Rogers: One moment. I object to that.

The Court: Sustained.

Q. Was the operator of the Opera House willing to release the R.K.O. pictures to you for use in the State Theatre?

Mr. Rogers: I object to that as calling for a conclusion.

The Court: Sustained.

Q. Did you take over the operation of the Opera House?

A. Yes.

[fol. 1197] Q. When did you take it over?

A. I don't recall the exact date. I believe it was in the spring of 1938.

Q. Did you receive the R.K.O. product for use in either of the theatres then?

A. No, sir, I did not.

Q. Did you have any conversation with Mr. Greenblat concerning obtaining the R.K.O. product for use in the two theatres after you took over the Opera House?

A. Yes.

Q. When did that conversation occur?

A. Before I took over the Opera House, and at the time I took over the Opera House.

Q. What did Mr. Greenblat tell you then?

Mr. Rogers: One moment. The question is directed to the time after.

The Court: You gave your talk before with Mr. Greenblat about taking product. Is this another occasion?

The Witness: Yes, sir.

The Court: After you had taken over the Opera House?

The Witness: Yes, sir.

Mr. Rogers: May I get the date of that, please?

The Court: When was this second talk?

The Witness: I was just trying to recall. It was shortly [fol. 1198] after I took it over and I contacted Mr. Greenblat.

Mr. Rogers: May we get that date?

The Court: I do not know as it appears yet when you did take it over.

The Witness: I took it over in the spring of 1938.

By Mr. Schilz:

Q. Can you give us any closer date than that?

A. It has been about seven years and I haven't had any connection with it since 1939.

Q. What did Mr. Greenblat tell you about the R.K.O. product when you contacted him about taking over the operation of the State Theatre?

Mr. Rogers: I respectfully suggest we ought to get some approximate date of this talk, so that I can intelligently meet it.

The Court: Can you tell us any closer when you took over the Opera House than the spring? Approximately the time.

The Witness: I couldn't tell you definitely, sir. It was in the spring.

The Court: Can you tell within two or three months.

The Witness: I should say around the latter part of May or June.

The Court: And after that you had another talk with Mr. [fol. 1199] Greenblat?

The Witness: Yes.

The Court: All right.

By Mr. Schilz:

Q. What did Mr. Greenblat tell you?

A. He told me he couldn't deliver the product to me as

he had promised because Schine had entered the picture and that New York had made a commitment to Schine, and I said, "Well, Herb, what about your promise to me in the event I made arrangements with Mrs. Stahl?" "Well," he said "I put myself out on a limb and there is nothing I can do about it; it is out of my hands." I said, "You know I can't exist with the product I have. I am depending on the R.K.O. product; I don't have enough for the State Theatre and now I have the Opera House." He said, "Well, why don't you contact Lou Lazar. Maybe he will release some of the pictures to you," and I did contact Mr. Lazar.

Q. What did Mr. Lazar say to you?

A. Well, Mr. Lazar told me that Schine——

Mr. Rogers: Get the date of this, please.

Q. When was it you contacted Mr. Lazar?

A. I should say it was within a day or so after I had talked to Mr. Greenblat.

Q. Do you recall it any closer than that? Can you give us [fol. 1200] the month?

A. I am afraid I can't.

Q. Sergeant Kemper, what was it you said to Mr. Lazar and what did he tell you with respect to the R.K.O. product?

A. Well, I told Mr. Lazar that I had talked to Herb Greenblat and I told him of the arrangement I had discussed with Mr. Greenblat for the product and how Greenblat told me that Schine had the product, and he suggested that I contact Mr. Lazar and see if he wouldn't release some of the pictures to me, and if my memory serves me right Mr. Lazar told me that they were not in the habit of releasing film.

Mr. Rogers: One moment. I move to strike on the ground that the witness says "if his memory serves him right."

The Court: Yes.

Q. What was the substance of what Mr. Lazar told you?

Mr. Rogers: Does he remember, first? I object unless——

The Court: State what was said, to the best of your recollection.

A. To the best of my recollection, he said that they would not release any of the product.

Q. During the 1937-1938 motion picture season what product did you obtain and use in the State Theatre?

A. United Artists, Universal, Columbia, and a few Monogram.

[fol. 1201] Q. Did you continue the operation of the Opera House during that season?

A. Yes, sir.

Q. Did you continue it in operation every day of the week?

A. No, sir, we were only open week ends, Saturdays and Sundays, and occasionally on a Friday.

Q. How large a theatre was the Opera House?

A. A little over 300 seats, about 325.

[fol. 1202] Q. What was the physical condition?

A. Well, it is an upstairs opera house, not too good.

Q. Directing your attention to the year 1939, what, if any, efforts were made to purchase the State Theatre?

Mr. Rogers: He had the State Theatre, as I understand.

The Court: He owned both of them.

Mr. Rogers: Yes, he owned both the State and the Opera.

Mr. Schilz: Withdraw that.

Q. Directing your attention to the year 1939, what, if any, efforts were made by the Schine defendants to purchase the State Theatre from you?

A. I was approached by Mr. Bud Silverman.

Mr. Rogers: May we get the date, please in 1939.

The Witness: I was approached prior to 1939.

Q. When were you first approached by Mr. Silverman with reference to purchasing the theatre?

A. Around December, 1937.

Q. December, 1937?

A. Yes, sir.

Q. What statement did Mr. Silverman make to you at that time?

Mr. Rogers: One moment. I object to that on the ground there has been no evidence adduced up to the present that Mr. Silverman had any authority to make any statements, [fol. 1203] or to make any representations or to in any manner bind the defendant, or that he had any authority whatever to bind the defendants.

The Court: There is some testimony here in reference to—is it Silverman?

Mr. Rogers: Silverman, sir. They have not connected him yet.

The Court: There is testimony, some testimony.

Mr. Rogers: Without connection, sir.

The Court: What?

Mr. Rogers: Without connection. They brought testimony in and your Honor admitted it subject to connection, and they haven't connected it yet.

The Court: Let us see, what did Mr. Silverman do?

The Witness: He was the district manager for Schine Theatres in Ohio.

By the Court: How did you contact him? How did you know who he was?

The Witness: He stopped by the State Theatre when we were under construction, made himself known.

Q. Did he say anything to you at that time?

Mr. Rogers: One moment. Up to the present I move to strike the testimony. Surely Mr. Silverman could not prove any agency out of his own mouth.

Mr. Wright: If the Court please, he has been identified [fol. 1204] Lazar on other negotiations.

Mr. Rogers: That may be so on other negotiations the presence of Mr. Lazar, but there — testimony here Mr. Lazar was present Mr. Silverman, and Mr. Silverman has — properly identified yet nor has his — been established.

The Court: There is testimony he was district manager.

Mr. Rogers: No, sir.

Mr. Wright: I beg your pardon. I think there is.

Mr. Rogers: Not by any competent source.

The Court: I received evidence that was presumed to be competent.

Mr. Rogers: All subject to connection, as I understood it.

The Court: Objection overruled.

Q. When Mr. Silverman saw you while the State Theatre was under construction, did he also offer to purchase the State Theatre?

A. Well, he stopped by the theatre and we had a general conversation. One of his first question- I believe he wanted to know if Nick Dipson was interested with me in the theatre, and I told him "No." Then he said, "Of course, [fol. 1205] you know Schine is in the city now, and are you going to complete the theatre?" And I said, "Yes. I was committed on the site, had money invested, a contract all signed" and we were going to complete the theatre, and he said, "Well, why don't you contact the Major, maybe you

can work something out." I said "No, I am going ahead and try and complete the theatre and operate it." Several months later he stopped by again after we were opened and came in and looked the theatre over and again suggested that I get in contact with the major, as he called him, referring to Mr. Lazar, and naturally, he asked how we were doing at that time. "Fair." I told him, "We could use more product, were unable to get it." I think we even discussed even the R.K.O. proposition. In fact, I had called Mr. Lazar requesting some pictures at the suggestion of Mr. Greenblatt.

Q. When did Mr. Silverman see you next?

A. I believe the next time I saw Mr. Silverman was in Cleveland, at a testimonial dinner for one of the Exchange managers.

Q. Can you give us the year and the approximate month?

A. I can't give you the month.

Q. What year was it?

A. It was in 1938.

[fol. 1206] Q. Was there any discussion at that meeting between you and Mr. Silverman as to the purchase of the State Theatre?

Mr. Rogers: Can't we get some approximate date fixed when this testimonial dinner took place and whose testimonial dinner it was?

The Witness: As I recall, it was Dave Miller's testimonial dinner.

Q. Who was Dave Miller?

A. He was the Universal Exchange manager.

The Court: Where was this?

The Witness: What hotel?

The Court: Where? What city?

The Witness: In Cleveland, Ohio.

The Court: Tell as close as you can the date. It was in 1938.

Q. At that dinner——

Mr. Rogers: I think his Honor suggested he fix the time in 1938.

The Court: About when was it, have you any recollection?

The Witness: No, sir. I have been out of that situation so long it is pretty difficult to give dates.

The Court: Spring, summer, fall or winter?

The Witness: I believe it was in the spring.

Q. And at that dinner what, if anything, was said to you [fol. 1207] by Mr. Silverman as to the purchase of the State Theatre?

Mr. Rogers: One moment. I object to the form of the question as leading. Let us get what the conversation was.

The Court: That is true. Your question was leading. State what talk you had with Silverman.

The Witness: We had no talk regarding the purchase of a theatre at that time. However, he did bring Mr. Lazar over.

Mr. Rogers: One moment, I move to strike all after the testimony that there was no talk about the purchase of the theatre.

The Court: State the conversation.

Mr. Rogers: The conversation only.

Q. At the testimonial dinner did you meet any other official of the Schine organization?

A. Yes, sir, I met Mr. Lazar.

Q. By whom were you introduced?

A. Bud Silverman.

Q. What was said by Mr. Lazar and by yourself?

A. Mr. Lazar suggested that we have a conversation and see if we couldn't work something out in Shelby, and I promised to contact him, I believe, the following week in Bellefontaine. We had no definite conversation as to whether they were going to purchase or not at that time.

[fol. 1208] Q. Did you meet Mr. Lazar in Bellefontaine?

A. Yes, sir.

Q. What was said at that time by Mr. Lazar and yourself?

Mr. Rogers: May we get that date?

The Court: He said the following week. You said the following week?

The Witness: I believe it was, sir. Before I went to Bellefontaine I believe we had some conversation——

Mr. Rogers: One moment. That is not responsive. I move to strike. The question was "What was said."

The Court: All right. What was said in this conversation with Mr. Lazar?

The Witness: In Bellefontaine?

Q. Yes.

A. Mr. Lazar told me that the situation in Shelby was not too healthy, it wasn't too profitable for them, it wasn't their expectations, he knew it wasn't too profitable for me, I didn't haven't any more hopes of getting any more product and the thing to do is see if we couldn't get together and work out a deal. He asked me I believe at that time what my investment was in the theatre and what I would be willing to take for it. I told him I had an associate at [fol. 1209] that time and I would have to discuss it with him. So he told me to come back and give it some thought and contact him again, or he would contact me, and see what we could work out.

Q. Did you tell him what your investment in the theatre was in response to his question?

A. I believe I told him, yes.

Q. What did you tell him?

A. Around $15,000 at that time.

Q. When did you next see Mr. Lazar?

A. I believe it was in July.

Q. Of what year?

A. July, 1938.

Q. And where?

A. Well, I saw him one time at Bellefontaine.

Q. Did you see Mr. Lazar a number of other times?

A. Yes, I saw him quite a number of times.

Q. In this same connection?

A. Yes.

Q. Where did you see him? At what point?

A. I saw him in Cleveland. I saw him in Bellefontaine. I met him one day in Mansfield, Ohio. He called me from Cleveland and asked me to meet him over there and have lunch with him. I did.

Q. How long did this series of meetings continue?

[fol. 1210] A. Six or seven months.

Q. What, if anything, was said during your meetings with Mr. Lazar as to closing the State or Opera House Theatres in Shelby.

The Rogers: I object to that as leading.

The Court: State the particular time and state what your conversation was.

Q. Can you give us a closer approximation, Sergeant, as to when these various meetings with Mr. Lazar occurred?

A. No, I can't. We corresponded in regards to them.

The Court: You said you had a talk in July, 1938. What was said at that time? What talk did you have with him about that time and you had some talks prior to that?

The Witness: He still wanted to work out a deal for the situation.

The Court: What did you say?

The Witness: Well, he told me as on every occasion that the town was not profitable, was not big enough.

Mr. Rogers: I move to strike.

The Court: Strike it out. In July you said he wanted to make out a deal. That was your own conclusion. Give what he said. Did he say he wanted to make a deal with you?

[fol. 1211] A. Yes, sir.

The Court: What did you say?

The Witness: Well, I told him I would be willing to make a deal if I could get the right price for it.

The Court: What happened after that conversation?

The Witness: He again said Schine couldn't pay the amount of money I had offered it to them for in the situation, it wasn't worth that to them and they had a partner there who they would have to sell on the idea before they could make any deal, and again he wanted me to get down to rock bottom prices that I would take for the situation, telling me that I knew it would never be profitable, that the town was not big enough for the two operations, and I couldn't better my product, and he suggested I make a deal with him and try somewhere else, or make a connection with a theatre organization as manager.

Q. Did he name the theatre organization?

A. No. As a matter of fact, he did say he thought maybe Schine could use me, if I was interested.

Q. When was the last conversation you had with Mr. Lazar on this subject?

[fol. 1212] A. The last conversation was in 1939.

Q. Can you fix the month?

A. I believe it was July.

Q. What was the nature of that conversation?

A. I had talked to Mr. Lazar, and he said his partner wasn't very willing to make a deal, neither was Mr. Meyer Schine, because they felt that I was waging a losing fight, I was going to lose out and that, however, he would take it up with Mr. Meyer Schine at the convention in Gloversville, I believe it was to take place a week or so later.

Q. Was anything else said?

A. I don't recall.

Q. During all your conversations over this period of time with Mr. Lazar was anything said as to the manner in which Schine would operate theatres in Shelby?

Mr. Rogers: May it please the Court, I object to that on the ground it is leading, and I wish Mr. Schilz would stop asking leading questions.

The Court: He always repeats the testimony. He asked the conversation at various times. Unless you exhaust his recollection of the conversations. When you exhaust his recollection, then you may call his attention more particularly.

[fol. 1213] Q. Have you given the Court your best recollection of these conversations with Mr. Lazar?

A. Yes, sir.

Q. The substance of them. During this period of conversations, what if anything was said about closing the State Theatre and the Opera House, if operated by Schine?

Mr. Rogers: I beg your pardon. May it please the Court, I must insist that the questions are all leading. Will the Court kindly instruct Mr. Schilz to stop asking leading questions. He ought to know how to ask a proper question. I am tired of objecting to them and up to this point, I think it is unfair practice. He has been warned several times.

Mr. Schilz: I may have mistakenly attempted to follow the Court's suggestion as to the manner in which to develop this evidence.

The Court: The date or occasion when the transactions took place is, of course, material to the defendants, and they are entitled to know. Read the last question.

(Last question read.)

The Court: Have you related all the conversations that [fol. 1214] you recall you had with these men?

The Witness: What?

The Court: Related all the conversations that you had with these men? You spoke about, Lazar, either one or both.

Q. With Mr. Lazar.

The Court: Have you stated all of your conversations that you recollect with Lazar?

The Witness: Well, during the conversations, of course, he asked me the terms of the leases I held on two theatres, also if there was anything in the lease stating that they must be kept open any number of days per week.

Q. What else did he say in that regard?

A. I told him that the Opera House must be kept open two days a week, but there was nothing in the State lease, stating it must be kept open any stated number of times.

Q. Did he say anything else?

A. Yes.

Q. What?

A. In the event that we concluded the deal that in all probab-ly they would close the State and operate the Opera House.

Q. What, if any, disposition did you make of the State Theatre after the summer of 1939?

[fol. 1215] A. Well, the summer of 1939, Mr. Lazar's prediction came true——

Mr. Rogers: I move to strike.

The Court: Strike it out.

Q. Just answer any question, Sergeant. What disposition did you make of the State Theatre?

A. I turned the theatre over to the associates I had in Shelby.

Q. Have you had any connection with the operation of the theatre since the summer of 1939?

A. No, sir. I had no connection, and, as a matter of fact, I haven't been there since.

Q. What was the last time you talked to Mr. Lazar, Sergeant?

The Court: When was the last time?

Q. When was the last conversation you had with Mr. Lazar? Can you fix the time of your last conversation?

A. I believe I stated it was in July.

Q. Can you fix it any closer than that?

A. No, sir.

Q. July of what year?

A. 1939.

Mr. Schilz: That is all.

The Court: And when did you discontinue your connection with it? What time?

The Witness: Latter part of August, 1939.

[fol. 1216] The Court: 1939?

The Witness: Yes, sir.

The Court: Cross-examine.

Cross-examination.

By Mr. Rogers:

Q. When you started converting the building that was on the site of the State Theatre, the Castamba Theatre was already in the town, was it not?

A. Yes, sir.

Q. And operating?

A. Closed, sir.

Q. You mean closed for repairs?

A. Yes, sir.

Q. And that is the only reason it was closed, isn't that right?

A. I couldn't state as to that.

Q. It had been in operation as a motion picture theatre before you started any work on the State, had it not?

A. Yes, sir.

Q. And when you were in the course of remodeling the building on the site of the State Theatre into a moving picture theatre, you then during the course of that operation made the deal to take over the Opera House, didn't you?

[fol. 1217] A. During the course of the construction?

Q. Yes, while you were doing the construction work on the State you made the deal to take over the Opera House, didn't you?

A. No, sir. I believe that was made later. The State was already opened.

Q. You mean the State was open and operating?

A. Yes, sir.

Q. When you made your deal to take over the Opera House?

A. Yes, sir.

Q. With reference to this so-called Opera House, where was this Opera House located?

A. It was located on South Main Street in Shelby.

Q. And it occupied part of a building, did it?

A. Yes, sir, second floor.

Q. What kind of a building was that?

A. I believe it was stone and brick construction.

Q. And this had the upper floor, this so-called Opera House, had the upper floor of that building, is that right?

A. Yes, sir.

Q. Had to walk up a flight of stairs to get up there?

A. That is right.

Q. You made your deal to take over the Opera House in order to get the R. K. O. product, didn't you?

A. That was one of the reasons, yes, sir.

[fol. 1218] Q. Wasn't that the main reason?

A. Yes, it was.

Q. Wasn't it your idea if you could get the Opera House and get the R. K. O. product that way, that you would then close the Opera House and operate only the State?

A. No, sir, my deal with the Opera House——

Q. I ask you what you intended to do?

A. I intended to operate according to the contract I made with the landlord.

Q. Pardon me. You hadn't made any contract. I ask you when you proposed to take it over, when you proposed to take it over, you proposed to take a lease on it and close it and only operate the State, didn't you?

A. No, sir, I did not.

Q. Didn't you operate the Opera House for two weeks only because there was a clause in that lease obligating you to operate it two days a week?

A. No, sir, it was a matter of choice of product. I figured if I could make the deal——

Q. One moment. You say you kept the Opera House opened two nights a week, because of shortage of product?

A. No, sir, I did not say that.

Q. That is what I understood you to say. Did you have enough product purchased to operate the State Theatre and operate the Opera House both continuously every day [fol. 1219] in the week?

A. No, sir.

Q. In other words, you say you did not have enough

product then for the Opera House, is that right, to operate that every day in the week?

A. No, sir, I did not.

Q. You did not you mean?

A. I did not have sufficient product to operate.

Q. Were it not for the fact that your lease obligated you to operate two days a week in the Opera House, you would have shut the Opera House, wouldn't you?

A. Well, that is a hard question to answer.

Q. Don't you know whether you would or not?

A. That depends on a lot of conditions at the time.

Q. The Opera House was not making any money, was it?

A. It was getting buy. It didn't need a lot to get by.

Q. Did it make any money?

A. Yes, sir.

Q. About how much did it make?

A. We were only operating two days a week, probably $25-$30.

Q. You mean after all rental, film rental and overhead expense, it still made money?

A. As far as all, all the overhead, it was practically nil, because we used the same staff for both theatres.

[fol. 1220] Q. Whatever that was?

A. Yes, we made some.

Q. You didn't use the same film you used in both theatres?

A. No, sir.

Q. You had a contract for film separately?

A. Yes.

Q. After paying for rent at the Opera House and paying for film hire and whatever help you had, you say you still made a profit on the Opera House?

A. Yes, sir.

Q. Operating two days a week, is that right?

A. Yes, sir.

Q. In the month of September, 1937, were you in the process of doing this reconstruction job on the State Theatre?

A. Yes, sir.

Q. Were you at that time interested in any other theatres?

A. You mean financially?

Q. Yes.

A. No.

Q. You had no interest in any theatres?

A. No, sir.

Q. What was the Kemper Theatres, Inc.?

A. That was a corporation formed at that time to operate the State when it opened, and the construction of the theatre.

[fol. 1221] Q. And is that all the Kemper Theatres was doing?

A. At that time, that is the only deal.

Q. Is that the only thing it had?

A. Yes, sir.

Q. I show you this letter, and I ask you if that is your signature? (A pause). Is that your signature?

A. Yes, sir.

Mr. Rogers: I offer it in evidence.

Mr. Schilz: All right.

(Thereupon photostat of a letter dated September 16, 1937, was received in evidence and marked as Defendants' Exhibit D-41.)

Q. In the opening paragraph of that letter you say, "As the stationery will indicate, we are moving into the Ohio territory from our Wheeling, West Virginia Headquarters."

A. That is right.

Q. Whom did you mean by "we"?

A. My brother and my wife, who was also a stockholder in the corporation.

Q. You mean that you were all moving into the Ohio territory?

A. And we did.

Q. Into the territory?

[fol. 1222] A. Into Ohio, yes.

Q. You mean you moved into Ohio, is that what you mean?

A. To open the State Theatre.

Q. You said you were moving into the Ohio territory, and this letter was addressed to Mr. William Sussman, 20th Century-Fox Film Corporation. Was it your idea that you wanted to give him the impression that you were going into the Ohio territory to open theatres?

A. Naturally I was going in to open theatres.

Q. And that is the impression you wanted to give him?

A. Yes, sir.

Q. And not that you and your family were moving into the Ohio territory?

A. Kemper Theatres were moving in.

Q. And not your wife?

A. She was part of the corporation.

Q. She was part of the corporation?

A. That is right.

Q. "We find that your product has been sold this year to an independent operating the Castamba Theatre"?

A. That is right.

Q. You yourself were an independent, too, weren't you, if you got your theatre?

A. That is right.

Q. And then you say, "If it could be arranged this year, [fol. 1223] we would be very much interested. If not, would like to arrange a franchise starting with next year along the lines of the Wheeling deal." Which deal did you have in Virginia?

A. I am referring to the West Virginia Theatrical Enterprises that I made with Mr. Sussman, as I recall.

Q. That Wheeling deal was not your deal at all?

A. I represented Dipson on the deal.

Q. Never mind about Dipson. We are talking about Kemper Theatres, Inc.

A. It was a deal between Mr. Sussman and myself.

Q. Mr. Kemper, please, you were writing this letter in behalf of Kemper Theatres, Inc., weren't you?

A. That is right,

Q. Kemper Theatres, Inc., never had a deal in Wheeling, did it?

A. No, sir.

Q. It never operated a house in Wheeling, did it?

A. Not Kemper Theatres, Inc.

Q. That is what I am talking about, and you were seeking a franchise agreement, is that right?

A. First I was asking for——

Q. That is what you were seeking in this letter?

A. Naturally.

Q. In other words, you wanted an agreement for more [fol. 1224] than a year, and you wanted to get it away from the independent who was operating the Castamba Theatre, is that right?

A. I requested it, if they were willing to sell me at

that time, it was the practice, if possible, to make more than a one-year deal.

Q. In other words, you knew that the Castamba Theatre had the product of 20th Century-Fox, didn't you, at that time, at the time you wrote this letter?

A. Yes.

Q. And you were seeking to get Fox to sell that product away from the Castamba Theatre in your new theatre, weren't you?

A. Perhaps they would have.

Q. That is what you were seeking to do, weren't you?

A. Yes, naturally.

Q. And you were seeking to get a contract for more than a year?

A. If I could.

Q. That is what you were seeking to do, weren't you?

A. Yes.

Q. When you opened the State Theatre you had the product, as I understand it, of Columbia, Universal, United Artists, Monogram and some others?

A. No, I had part of Monogram. I didn't have all of it.

[fol. 1225] Q. Had part of Monogram, and what else did you have?

A. Columbia, Universal and United Artists.

Q. Up to the time that you sold your interest in the State Theatre you still had Columbia, Universal, and United Artists, part of Monogram, didn't you, first run?

Mr. Schilz: I object to the question. Sergeant Kemper did not testify that he sold his interest in the State Theatre.

Mr. Rogers: He said he disposed of it to two friends of his in Shelby. Let us see. I will cover it. I will cover it with one question, your Honor.

Q. When you ceased your operations at Shelby at the Theatre in 1939, is it accurate that you disposed of your interest to some friends of yours?

A. Yes.

Q. That is accurate, isn't it?

A. Yes, sir.

Q. And who were those friends?

A. Tom and James Gregory.

Q. They were old friends of yours, weren't they?

A. Not particularly old friends. Tom Gregory worked for me in Wheeling. He left there for another job, and then he came on to Ohio.

Q. They are in no manner connected with Schine, are they?

A. Not so far as I know.

[fol. 1226] Q. Schine has never had anything to do with the operation of the State Theatre since you got it?

A. Do you mean during the period I operated it?

Q. Yes.

A. No, sir.

Q. And you never made any deal with Schine, did you?

A. No, sir.

Q. Having established that my statement was accurate that you disposed of your interest in 1937, I wish to know whether from the time you started the operation of the State Theatre until the time you disposed of your interest in 1939 you always had Columbia, Universal, United Artists and Monogram first run; is that right?

A. I was able to hold onto it.

Q. I say, you had it?

A. Yes, sir.

Q. It was not taken away from you at any time during that period?

A. I attempted——

Q. I asked you was it taken away from you?

A. No, sir.

Q. Just answer my question and we will get along beautifully.

A. That is fine.

Q. Did you ever play R. K. O. product in the State Theatre?

A. No, sir.

[fol. 1227] Q. You are sure of that?

A. I don't recall. I was pretty desperate for product at one time. I might have picked up a second or a third run.

Q. Your answer is that you didn't play it?

A. Not as I recall.

Q. I show you this contract. Is that your signature? Are you puzzled as to whether or not it is your signature?

A. No, sir.

Q. You are sure that is your signature, aren't you?

A. Yes, sir.

Mr. Rogers: I offer it in evidence.
Mr. Schilz: No objection.

(Thereupon the contract with R. K. O. Radio Pictures, Inc., dated March 28, 1939, referred to, was received in evidence and marked Defendants' Exhibit D-42.)

Q. Now I show you Defendants' Exhibit D-42 in evidence and I ask you whether this contract is not one with R. K. O. for product at either the State or Opera House in Shelby, Ohio?

A. That is a contract for first run.

Q. It is a contract for first run, isn't it?

A. Yes.

Q. For the Opera House or the State?

Mr. Schilz: For what date?

[fol. 1228] A. That is what I wanted to see. It is dated March 23, 1939.

Mr. Schilz: What type of picture?
Mr. Rogers: Features.
Mr. Schilz: What kind of features?
Mr. Rogers: Four reissues.
The Court: First run, you say?
Mr. Rogers: Yes, sir.
The Court: R.K.O.?
Mr. Rogers: Yes, sir. Will you see if you can find the season on that? His Honor's question was about the season, as I recall.

By Mr. Rogers:

Q. Can you fix with some reasonable accuracy the date you took over the Opera House?

A. No, I can't tell you the exact date.

Q. Do you remember the year?

A. 1938.

Q. Wasn't it about the late summer or early fall of 1938?

A. No, I think it was before that.

Q. Wasn't it the summer of 1938?

A. I can't recall the exact date. I have been out of that situation since then and I haven't any correspondence.

Q. It wasn't any earlier than the summer of 1938 that you [fol. 1229] took over the Opera House, was it?

A. I don't believe so.

Q. It couldn't have been any earlier than the summer of 1938, could it?

A. Well, my recollection of the date is very hazy.

The Court: You opened up the State in 1937?

The Witness: Yes, sir.

The Court: Can you tell approximately when it was you acquired the Opera House?

The Witness: It was either in the late spring or early summer.

The Court: Of 1938?

The Witness: Yes, sir.

By Mr. Rogers:

Q. Do you know when you took up your negotiations to take over the Opera House, that is, when you started your negotiations?

A. I don't recall a definite date, no.

Q. Was it in 1938?

A. I believe we had conversations regarding it prior to that.

Q. Prior to what?

A. 1938.

Q. You believe you had conversations how long prior to 1938 when you first started your negotiations?

[fol. 1230] A. I would say December.

Q. You would say about December of 1937; is that right?

A. Yes, sir.

Q. When you first started your negotiations?

A. We were discussing the general condition and would visit one another.

Q. That was between yourself and the people who were operating the Opera House?

A. Yes, sir.

Q. You started your discussions about December, 1937; is that right?

A. With no definite program. Just possibilities.

Q. You were only discussing possibilities in December of 1937; is that right?

A. Yes, sir.

Q. And you didn't really get into the discussion of terms or money until 1938, did you?

A. There might have been a figure me oned on the house.

Q. When?

A. During the discussions in December, 1937.

Q. There might have been a figure mentioned?

A. Yes, sir.

Q. But you don't recall whether or not there was?

A. No, it was not a case of sitting down and trying to make a definite deal.

[fol. 1231] Q. It was just conversation at that time, is that right?

A. Possibilities.

Q. Conversation and possibilities?

A. Yes, sir.

Q. You really got into the negotiating of the deal in 1938, didn't you; is that right?

A. As far as I can remember, yes.

Q. Then when you testified under direct examination that you went to R.K.O. in August of 1937 to talk about R.K.O. product for the Opera House with Mr. Greenblat——

Mr. Schilz: I don't recall his testimony being to that effect at all.

Q. Didn't you testify that you tried to get 1937-1938 product?

A. I approached them, yes, for their product, but it was sold to the Opera House at that time.

Q. You say it was actually sold to the Opera House at that time?

A. That was the impression they gave me, yes. The Opera House was playing R.K.O. product.

Q. Did they tell you that it was sold to Schine at that time?

A. In 1937?

Q. Yes.

A. No, sir.

Q. When was it you claim you spoke with Greenblat about [fol. 1232] getting the product away from the Opera House, R.K.O. product away from the Opera House?

A. Just what do you mean by getting it?

Q. The Opera House was running R.K.O. at that time in 1937-1938?

A. Yes, sir.

Q. And they had the season's product of 1937-1938, didn't they?

A. As far as I know.

Q. Was it at that time that you were talking to Mr. Greenblat, that is, in July or August of 1937, in the hope of buying the R.K.O. product away from the Opera House; is that right?

A. Yes, buying the R.K.O. product.

Q. You knew it was playing at the Opera House, didn't you?

A. Yes, I saw the pictures there.

Q. You saw the pictures there?

A. That is right.

Q. And you went to Mr. Greenblat with the idea of buying the product away from the Opera House, didn't you?

A. I asked him about the possibilities of getting R.K.O. product.

Q. When Mr. Lazar—or was it Mr. Silverman who was speaking to you in July of 1938? Was it Mr. Lazar or Mr. Silverman who was speaking to you in July of 1938 about [fol. 1233] trying to make a deal with you to buy the State?

A. I think I talked to both of them at different times during that period.

Q. Didn't Mr. Lazar tell you at that time that he wasn't even sure that he could make any deal with you to buy the State Theatre from you, that he would have to consult Mr. Schine and he would also have to consult a partner they had there?

A. Yes, she told me any deal we might negotiate was subject to confirmation by the Schines.

Q. He told you he was not prepared and didn't have authority to make a deal without first consulting with them, didn't he?

A. He said he would have to have their consent before he could conclude it, yes.

Q. Didn't he tell you at that time he didn't have their consent to make a deal of any kind?

A. I don't think he committed himself definitely.

Q. When you had a talk in 1939, in July I believe it was, with whom did you have that talk?

A. Mr. Lazar.

Q. And did Mr. Lazar again tell you in 1939 that he wasn't really prepared to make a deal with you, that he would have to get the consent of Mr. Schine and their partner?

A. As a matter of fact, he said he would take it up with [fol. 1234] Mr. Schine at a meeting in Gloversville.

Q. He said he didn't even have their consent?

A. No, I don't think he used that phrase.

Q. Didn't he tell you he didn't know whether they would be willing to make a deal? Didn't he tell you he didn't even know whether they would be willing to make a deal?

A. That is right. He said he would take it up with them.

Mr. Rogers: That is all.

Re-direct examination.

By Mr. Schilz:

Q. Sergeant Kemper, I show you this R.K.O. contract, dated March 28, 1939, Defendants' Exhibit 42, and ask you if the motion picture season in which these pictures were to be played is indicated on this contract?

A. The season they were to be played?

Mr. Rogers: The season to be played, do you mean?

Mr. Schilz: The season in which the pictures were issued.

A. Released?

Q. Released.

Mr. Rogers: Well, may it please the Court, to save time, I think the contract speaks for itself and it may take this witness some time to wade through all this fine print.

Mr. Schilz: I would like to have the witness define one or [fol. 1235] two of these terms for the Court's benefit.

By Mr. Schilz:

Q. Does it state the period in there?

A. No, it doesn't. I looked for it before.

Q. Does it state the season in which the pictures are to be played?

A. Subjects are to be played at the rate of one per week, starting April 15, 1939.

Q. I call your attention to the fact that the first four pictures are designated "Re-issue." A re-issue is what?

A. It is a picture that has had a prior playing in the town. A re-issue is a picture that has been brought back, re-released. It may have played two or three seasons before or one of the prior seasons.

The Court: Would that still be a first run, except that it would be a reissue?

Mr. Rogers: That would still be a first run though, wouldn't it?

The Witness: Possibly first run for that season.

By Mr. Schilz:

Q. I call your attention to this picture entitled "Mother Carey's Chickens." Was that a feature picture?

A. Yes, sir.

Q. Do you recall the release date of that pciture, when [fol. 1236] that picture was released?

A. No, I don't.

Q. I call your attention to "Breaking the Ice." Do you recall the year that picture was released?

A. No, I do not.

Q. I call your attention to one entitled "Annapolis Salute." Do you recall the year that picture was released by the distributors?

A. No.

Q. Just run down the list and see if you see any there as to which you recall the particular motion picture season in which it was released for issue to exhibitors?

A. Well, I can give you an approximation, but not exact. I would say "Little Women" and "King Kong" were probably released in 1936-1937.

Q. This contract was made when?

A. March 28, 1939, the re-issue.

Q. Is there anything on the contract that indicates that those pictures were released during the 1938-1939 season by the distributors?

A. No, sir.

Q. Is this what is known as a spot booking contract (showing to witness)?

A. Well, not exactly a spot booking contract. In fact I have never seen a spot booking contract. Spot booking [fol. 1237] arrangements, but never a contract.

Q. Was that a spot booking arrangement?

A. No, sir, that was a contract for the re-issues for the Opera House or the State Theatre.

The Court: What would be the difference between an arrangement and a contract?

The Witness: On a spot booking arrangement you get together with the exchange manager and he has a number of pictures, a number of slough pictures, available, and you

will use them if and when you can. There is no definite commitment to use a certain number of them or play them a certain length of time.

The Court:

Q. That is all stated on a contract?

A. On a contract it is, but on a spot booking arrangement not necessarily.

By Mr. Schilz:

Q. Do you recall the negotiations for these pictures set forth in this contract, what the negotiations were and who you had them with?

A. No, I don't. I don't recall who I discussed it with.

Q. Is there anything else about that contract you want to tell the Court?

Mr. Rogers: I object to that.

[fol. 1238] The Court: That is pretty general.

Mr. Schilz: Just to save time, Mr. Rogers.

Mr. Rogers: I don't like time being saved that way.

Mr. Schilz: That is all.

Recross-examination.

By Mr. Rogers:

Q. By the way, Sergeant Kemper, is there anything on this contract, Defendants' Exhibit D-42, that would indicate that any but the first four subjects on that contract are reissues?

A. Nothing indicated on the contract.

Q. And this was a definite contract to definitely play these pictures at definite times; is that right?

The Court: The paper shows for itself.

Mr. Rogers: I mean there was some confusion about this spot booking business. This is not a spot booking business.

The Court: He said there was nothing to indicate whether it was the first season's run or not.

Mr. Wright: I take it there is no attempt being made here to give the Court the impression that this was a contract for current features, because it clearly is not.

Mr. Rogers: There is no attempt to give the Court any [fol. 1239] impression except that from which the Court can draw a reasonable inference from the testimony.

The Court: It may appear later on.

Mr. Wright: We will, of course, put in the R.K.O. release sheets, which will show the precise age of each of these titles.

The Court: That will clear it up then.

By Mr. Rogers:

Q. Now, Sergeant Kemper, you said that re-issues are pictures that have played the town before; is that right?

A. They have been released in a prior season or played the town before.

Q. But it does not necessarily follow that because a picture is a re-issue that it has played that town before, does it?

A. Not necessarily, no.

Q. And any number of these re-issues are very valuable, aren't they?

A. I wouldn't hazard a guess as to the valuation of these re-issues.

Q. You are stationed near New York City now, aren't you?

A. Mitchell Field.

Q. Mitchell Field is not very far from New York City; it is right on Long Island?

[fol. 1240] A. Sometimes it seems very far away.

Q. When you can't get a pass it seems a long way off?

A. Sometimes it does.

Q. You know that "Snow White" is being re-issued now on Broadway for the first time, don't you?

A. Yes.

Q. And doing a good business?

A. That I c[illegible]t say.

Q. It has b[illegible] there for a long time, hasn't it, been running a long time in the same theatre on Broadway as a re-issue, hasn't it?

A. I can't verify that. I can recall seeing the advertisement of "Snow White". What theatre it is playing at I don't recall.

Q. You have seen those advertisements for a long time of "Snow White" playing at the same theatre on Broadway?

A. No, I don't remember that. I remember seeing the advertisement but whether it is at the same theatre I don't know.

Q. And "Snow White" was originally released several years ago, wasn't it?

A. Yes, sir.

Mr. Rogers: That is all.

Mr. Wright: That is all. One of the matters that I wanted to bring up at this time, your Honor, was the ques-
[fol. 1241] tion of identifying the documents that are supposed to have been produced by the defendants pursuant to a subpoena duces tecum that was returnable, I think, at the beginning of the trial. A large part of these documents are contracts which were previously identified at depositions that were taken at Gloversville. Other sections of the subpoena call for memorandum and correspondence and other documents which, as far as I know, have never been produced, and I think we should know now what the defendants have been able to produce in response to these various paragraphs, and if there is more to come when it will be available, so that we can have all the material that we are going to use properly identified before we come back in August and know exactly what is available and what is not.

Mr. McKay: Your Honor, Mr. Wright says there has been a vast number of contracts identified on depositions. This volume (indicating) consists of nothing but the identification of contracts. I think there are about 2000 of them
[fol. 1242] here. Those have all been marked in the deposition. I haven't seen this new subpoena. I suppose it is like the one that was served two years ago. Mr. Antevil has been charged with the collection of the papers called for by the subpoena. I believe we have produced during this part of the trial everything they have called for except Mr. Marcus tells me in the case of Corbin there are one or two contracts missing. That was because we could not locate them. We brought down here as much as we could pack covering the thirteen situations which they told us they were going to cover during this ten-day period. Those have all been repacked in anticipation of our departure. I will be very glad to make any reasonable arrangement with Mr. Wright for his representative and Mr. Antevil and myself to get together during this two months' period and mark for identification whatever other material they want. The stuff that was here is being sent down to New York. That will be
[fol. 1243] available in my office. The rest of it will either be available in my office or in Gloversville.

Mr. Wright: I think we ought to have a definite arrangement. As I understand it, as to inter-office correspondence with the distributors and the correspondence of the defendants that was subpoenaed, they have produced nothing, and their position is that they have no such correspondence because it was destroyed. I should think we should have whatever statement there is to be made on that on the record now, so that we know what to expect in reference to the correspondence.

Mr. McKay: I can't make that statement because I haven't been doing the searching for the documents. I know they did have two fires before we were supposed to meet for trial two years ago, and they have had another one since then, and Mr. Antevil tells me a considerable amount of the material has been destroyed.

Mr. Wright: Can we have a statement from them as to what there is and when and how it will be made available? Mr. Antevil can enlighten us on that.

[fol. 1244] Mr. Antevil: As soon as I complete my search and I definitely know what the status of the correspondence is I will be glad to make a statement for the record.

Mr. Wright: When will you do that?

Mr. Antevil: When I get back.

Mr. Wright: About what time will we be advised?

Mr. Antevil: I will be in touch with Mr. McKay and Mr. McKay will let you know.

Mr. McKay: This is the 8th. Can we undertake to advise them by July 1st? We will undertake to give him definite advice on that by July 1st.

Mr. Wright: As I understand it, will the documents be made available for identification at that time?

Mr. McKay: At that time we will make the documents available for identification. I hope you will suit our mutual convenience.

Mr. Wright: Yes.

The Court: I think if these things can be agreed upon it will save a lot of time.

Mr. Wright: As I understand it, Mr. McKay has now said he will give us a definite answer on our request for admission of facts by July 15th. We have agreed to extend [fol. 1245] the time to that date on that. In addition, of course, to what is stated there I would suggest that that admission—that request does not cover specific documents, but if we can have this material identified in the meantime,

both that produced by the distributors and the defendants, I mean, we will then serve a specific request as to those particular documents, copies or photostats of which will be in the defendants' hands, and we should also like to get that out of the way by July 15th, if that is agreeable.

Mr. McKay: I am not sure I understand what you mean, but I do want to make this observation: This recess was supposed to give me, as well as Mr. Richardson and Mr. Rogers, some time to take care of my other commitments, and I don't want to spend all my time on this. I will have to handle the requests to admit and they are very voluminous.

Mr. Wright: I simply wanted to outline the procedure we propose to adopt now.

The Court: What you want first is the exhibits, those that are subpoenaed, the documents that have been sub-
[fol. 1246] poenaed here so that you may supplement your request to admit; is that it?

Mr. Wright: We will supplement the requests to admit with a request to admit the authenticity of specific documents that we draw from the distributors' files in the meantime.

Mr. McKay: If they exhibit the documents to me and I am able to identify the signature I will be glad to admit the authenticity of the signature, but not the authority of the signer. I should have to see those documents.

Mr. Wright: We will make available, of course, copies of any documents with respect to which we make specific requests, and then, as I understand it, the documents that you are to produce in response to the subpoena duces tecum will be made available for identification at your office or at Gloversville some time prior to July 1?

Mr. McKay: No, commencing July 1.

Mr. Wright: We should be able to do it all in a day or so.

Mr. McKay: I hope so. I should like your Honor's thought on this: This deposition here, as I told you, all it amounts to is identification of contracts. If you will just [fols. 1247-1249] look at this one page it will give you an idea (indicating). It runs that way all the way through.

The Court: I do not see that we need to re-identify those contracts.

Mr. McKay: Those contracts have been assigned a number in the deposition. The Universal exhibits start with U-1 and run along and Fox starts with F-1 and go along,

so that they are all numbered, and I do not see why we cannot just use those as the record.

Mr. Wright: As to those we can. I was referring to the other matters——

Mr. McKay: This will save us a couple of weeks of testimony.

The Court: Yes, it would be foolish to go over that again.

Mr. Wright: There is no question about that.

The Court: All right, we will adjourn this trial now until August 15, 1944, at 10 A.M.

(Whereupon an adjournment was taken until Tuesday, August 15, 1944, at 10 o'clock A.M.)

[fol. 1250] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, September 26th, 1944, at 1:30 P. M.

APPEARANCES:

Robert L. Wright, Esq., Special Assistant to the Attorney General.

John F. Clagett, Esq., Special Assistant to the Attorney General.

Harold L. Schilz, Esq., Special Assistant to the Attorney General, and

Milton Kallis, Esq., Special Attorney, Washington, D. C.

Edward F. McClennen, Esq., and Arthur E. Whittemore, Esq., Boston, Mass., and

Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur J. Homans, Esq., Howard M. Antevil, Esq., appearing for Defendants.

[fol. 1251] OFFERS IN EVIDENCE

Mr. Wright: If the Court please, at this time we are going to offer in evidence certain license agreements which were previously subpoenaed from Schine and identified by exhibit numbers which we have agreed to retain in offering them here. The agreements we are now going to offer are the franchise agreements and master agreements referred to in the trial brief which were executed by certain of the Schine defendants with each of the major distributors.

The term "franchise," as we use it is an agreement covering more than one motion picture season, and the term "master agreement" is a similar agreement limited to one season which covers the distribution of films of a particular distributor in all or substantially all of the Schine towns.

The first series that we will offer will be the Warner agreements. Those have been identified as W-3 through W-8, W-34, W-35-A and 35-B.

The Court: Agreement or agreements?

Mr. Wright: This is a series of agreements. Some are [fol. 1252] master agreements covering one season; and there is one agreement which covered a three-year period, a franchise.

Mr. McKay: What are your numbers?

Mr. Wright: W-3 through 8 and 34, 35-A and 35-B.

Mr. McClennen: Instead of dealing with these one by one as they are offered, may we save the objection to the admissibility of all these agreements by this one objection to save interruption?

The Court: Yes, I should think so. One objection is sufficient, I think.

Mr. Wright: If there is an objection I suppose we will be entitled to know the ground of it?

The Court: Yes, we should be informed of the grounds of the objection.

Mr. McClennen: The objection is that there is nothing monopolistic or in restraint of trade in a franchise agreement. That is intrinsically there is no difference between an agreement for more than one year and an agreement for one year. It indicates no monopolistic intent and no intent to restrain trade, and has no effect to restrain trade.

The Court: Perhaps, it would be assumed standing alone [fol. 1253] it would not be sufficient.

Mr. Wright: Of course, I might say, if the Court please, as to these agreements we will later make the argument that they are illegal per se, although acceptance of that argument is not a condition precedent to their admission in evidence, but I simply want to note that we do take the position each one of these agreements is in and of itself an illegal agreement.

The Court: That is not the sole purpose of the offer?

Mr. Wright: No, indeed. They are offered to lay the foundation.

The Court: Objection overruled at this time. If they are not illegal per se, why, then, we will have to wait to take testimony and see the connection.

Mr. McClennen: I made the objection so that the situation would be before your Honor when it was offered, and I have not made any argument in support of the objection. I should not have said anything more had I not been asked for the fundamental reasons for the objection.

The Court: Objection overruled. Received. Are you marking those?

[fol. 1254] Mr. Wright: They have already been marked for identification.

The Court: They should be marked in evidence.

Mr. McKay: I would like to advise you that Mr. Wright requested me to have in court all of the documents that had been previously identified, and I spent about four hours last night arranging these in order, in order to be able to present them in the order in which they were subpoenaed and identified. I have about seven or eight hundred documents here, five hundred of which precede these. Apparently he is going to proceed out of order, and I may have to ask your indulgence in locating them. I have here 3 through 7, and I will proceed to find the 8th.

The Court: Do you have copies, Mr. Wright?

Mr. Wright: We do not have.

Mr. McKay: Each of these documents has been identified and inspected by the plaintiff.

The Court: I suppose you will have to have 8 in order to mark them?

Mr. McKay: The 8th I believe I can find, although in my list it looks as though it consisted of 17 contracts.

[fol. 1255] Mr. Wright: I think all that needs to be done by way of marking is simply to strike the "For identification" off.

The Court: We have to have 8 here.

Mr. Wright: Each one should be here. I think there should be a statement for the record as to what each one of these is, so that it will be clear just what they are.

The Court: Let us get No. 8 first.

Mr. McKay: Does this agree with you? W-8 consists of license agreements 1 through 17?

Mr. Wright: I have in my notes W-7 is the master agreement and W-8 contains the contracts made pursuant to the agreement. Is that correct?

Mr. McKay: This is the stenographer's note and initialed by Mr. Kallis. It says "License agreement 1 through 17, inclusive."

Mr. Wright: Yes, I take it those are license agreements which are subject to the terms of W-7. That is my understanding and, therefore, are properly part of the master agreement W-7.

Mr. McKay: The contracts will speak for themselves on that. Your understanding what they are does not mean anything.

Mr. Wright: If you produce them, maybe we can see what [fol. 1256] they are.

The Court: You distinguish these agreements, you say, as "Master agreement," and the other is what?

Mr. Wright: Master agreement or one-year agreement; franchise covers periods of two or more seasons.

The Court: Are you designating each as franchise and master?

Mr. Wright: That is what I was going to do when those are marked in evidence.

Mr. McKay: Your offer includes W-6 and the contracts that are marked W-6, 1, 2, 3, and so forth?

Mr. Wright: 1 to 41, as I understand it, those are contracts which are part of W-5.

Mr. McKay: These are marked W-6, and they run——

Mr. Wright: I think while Mr. McKay is looking——

Mr. McKay: I am giving a batch of these to start with. I have W-1 to W-16. You can start marking those to save time. If your Honor please you will note these contracts are included in a folder which includes some other contracts which are not offered here, and may it be understood only such contracts as are actually marked are received?

[fol. 1257] The Court: Certainly. You say 1 to 16. He is referring to 3 to 8.

Mr. McKay: I will get to 8 in a minute. What I mean by that is, you will notice this contract is not marked. This is the one that is marked. They have been kept in a folder for convenience, because they relate to the same theatre and town.

The Court: We only have to consider those which are marked in evidence.

Mr. McKay: I simply wanted to call that to your Honor's attention. I will get the rest of them just as fast as I can pick them out of the box. This concludes the W-6 series. It runs up to 41. (Handing documents to Mr. Wright.)

The Court: You better find No. 8 first. You offered 3 to 8 and 34-A and 35-A and B. Let us have those picked out.

Mr. McKay: That is W-8 (1 to 17), which is—that is what it says on there, is it not?

Mr. Whittemore: 1 to 17, yes.

Mr. Wright: I would like to state for the record, if the Court please, what these various numbered documents are. [fol. 1258] The Court: Have you got No. 8 now?

Mr. Wright: I take it the only marking that needs to be done is simply to strike out the "For identification."

The Court: Have you got them here physically?

Mr. Wright: Yes, they are all here physically now.

The Court: All right. I suppose each would show for itself. You are going to show which one is master agreement and which one franchise agreements?

Mr. Wright: That is what I wanted to state here, to cover exactly what each one was.

Mr. McClennen: If your Honor please, to avoid any misunderstanding later, we do not concede the distinction between franchise and master agreement or annual contract which has been stated, and to avoid interrupting at each time, may it be understood that we reserve a challenge of that description so that it can be dealt with?

The Court: It is not a question of what the name is. It is a question of what it contains.

Mr. McClennen: Precisely, but we do not want by our silence to concede that the character of the instrument is as [fol. 1259] stated, but merely a contract of that date.

Mr. Wright: I will describe these in chronological order. Exhibit W-7 is——

The Court: Why do you say "W-7"?

Mr. Wright: That was the identification which the document was given in the course of its prior identification.

The Court: What does the "W" mean?

Mr. Wright: That is Warner Brothers contract, the scheme of identification used.

The Court: It stands for "Warner"?

Mr. Wright: Yes.

The Court: 7 is one of the 3 to 8?

Mr. Wright: W-7 is a letter agreement between Schine Theatrical Company, Inc., and Warner Brothers pictures, dated April 24, 1935, as modified by a supplementary letter dated April 29th, 1935, which is also a part of this same exhibit, which covers the exhibition of Warner films in the Schine Circuit for 1935-1936 season. It contains a general description of the terms which are to be applicable in pictures over the circuit.

(Thereupon letter agreement between Schine Theatrical Company and Warner Brother Pictures, dated April 24, 1935 and letter dated April 29, received in evidence as Plaintiff's Exhibit W-7.)

[fol. 1260] Mr. Wright: Exhibit W-8 (1 to 17) are individual license agreements between Vitagraph, Inc., a Warner distribution subsidiary, and Schine Theatrical Company, Inc., which bear the reference "Subject to all terms and conditions of master agreement and"——

Mr. McKay: "If any."

Mr. Wright: "if any," yes; and cover the same season that the master agreement just identified covers, that is, the '35-'36 season. Each of these "W"-8 agreements covers, I believe, a different town. There are eighteen of them.

Mr. McKay: Seventeen of them.

Mr. Wright: 1 to 17, inclusive, your Honor.

Mr. McLennen: Are they of a common date or is each a separate date?

Mr. Wright: We may as well put the dates in. The dates speak for themselves. I believe they are all—the applications are all dated as applied for in August, 1935, and approved the same month.

The Court: The 17?

Mr. Wright: Yes, sir.

Mr. McKay: Yes. If it should be necessary to correct [fol. 1261] that, it can be done. I think that is probably a correct statement.

The Court: The papers will show for themselves.

Mr. McKay: Has the stenographer marked these?

The Court: I think we can expedite this part of the case greatly by you saying they all involve these agreements, which you are seeking to establish, relate to agreements made between the various producing companies and the defendant Schine, and subject to the objection of the defendant. I don't see why we can't just mark them all the way through and ascertain ourselves what they are.

Mr. Wright: Yes, I think the marking can be done outside the precinct of the court. I think the only thing that is important to do here is to make the statement for the record, so the record will show what the various exhibits are, and he can mark these after the session is over.

The Court: Cover it as quickly as you can.

(Thereupon the individual license agreements between Vitagraph, Inc., Exhibit W-8 (1 to 17) referred to were received in evidence.)

[fol. 1262] Mr. McKay: These papers have already been marked, and such of them as the plaintiff has desired to inspect have been inspected. Just as an example, this is a record made by a court stenographer in New York on an inspection of these documents and it does seem to me that the thing could be facilitated by adopting this proceeding or let the stenographer adopt this as part of his court record. I recognize the fact we are going to take an awful long time.

The Court: Either do that or do it here when you offer it as an exhibit here, just briefly state what it is supposed to be.

Mr. Wright: That is all I want to do. I think the marking can be done outside the precinct of the court. That is the quickest way to put in the record what these things are.

The Court: Unless you are satisfied with the accuracy of this list.

Mr. Wright: That list, I don't think, is sufficiently explanatory to do the job. I don't think it is complete enough.

Mr. McKay: If you are going to characterize the document you will have to do it individually. These markings [fol. 1263] identify the document.

The Court: Does it identify whether they are for one year or more than one year?

Mr. McKay: That would appear in the document itself.

The Court: That is very true. I think you can have an agreement on all that. I don't think it is necessary to go to that extent.

Mr. Wright: If your Honor please, I think it is necessary, in order to understand what we have here, to make a brief statement of what each document is at this time.

The Court: You can tell it is purported to be an agreement of a certain date and covering a certain period. Its contents, of course, the Court passes on.

Mr. Wright: That is right. That is all I propose to do.

The Court: You can do that wholesale rather than retail, I thought. We will see how we get along.

Mr. Wright: Exhibit W-5 is a letter agreement dated March 24, 1936, between Warner Bros. and Schine, or, rather, between Vitagraph, Inc., and Schine Theatrical Co., Inc., which covers the general terms for the exhibition of pictures in the circuit for the '36-'37 season.

[fol. 1264] (The letter agreement, Exhibit W-5, dated March 24, 1936, referred to was received in evidence.)

Mr. Wright: The Exhibit W-6, sub-numbers 1 to 41, inclusive, are individual license agreements for the same season, which bear the notation "As per master agreement."

The Court: You mean 41 separate——

Mr. McKay: Read the whole thing, if you are going to read part of it.

Mr. Wright: The phrase I refer to reads "In full trailer rental and split figure to be determined on same basis as on other '36-'37 releases as per master agreement."

(The individual license agreements, W-6 (1-41, inclusive) received in evidence as Plaintiff's Exhibit W-6 (1-41, inc.)

Mr. Wright: And Plaintiff's Exhibit W-31, a three-year agreement, dated August 27, 1938, between Vitagraph, Inc., and Schine Enterprises Corporation and Schine Circuit, Inc., covering the distribution of films in the circuit for the seasons '37-'38, '38-'39 and '39-'40.

Mr. McKay: I would like to have all that stricken except it is an agreement dated a certain date, between certain [fol. 1265] parties. It is a long agreement and I think the Court will have to read it.

The Court: If it covers all the Schine——

Mr. McKay: It doesn't.

Mr. Wright: Whatever it covers.

Mr. McKay: Whatever it covers is stated in the agreement.

Mr. Wright: Is stated in the agreement, and it does cover a very long list of towns, which is set forth in the schedule attached.

(The three-year agreement, dated August 27, 1938, was received in evidence as Plaintiff's Exhibit W-31.)

Mr. Wright: W-35-A and W-35-B are agreements relating to the '40-'41 seasons' product, which are both dated September 11, 1940.

(The agreements relating to the '40-'41 seasons' product referred to received in evidence as Plaintiff's Exhibit W-35-A and W-35-B.)

Mr. Wright: I beg your pardon, there is one group of exhibits I overlooked there that relates to the three-year agreement W-3; that is W-4, 1 through 99. Different towns.

Mr. McKay: W-4, 1 through 99?

Mr. Wright: Yes, those, I think, are the deal sheets for the three-year agreement.

[fol. 1266] Mr. McKay: That is W-4, 1 through 99.

(Deal sheets for three-year agreement referred to received in evidence as Plaintiff's Exhibit W-4, 1 through 99.)

Mr. Wright: W-4, 1 through 99, are so-called deal sheets executed on behalf of Warner and Schine, which are dated, I believe, for the most part, September 28, 1937, each relating to a different town, and which cover the pictures for the same season as that three-year agreement, '37-'38, '38-'39 and '39-'40.

The Court: You mean by a deal sheet agreement, you mean——

Mr. Wright: Yes, these are individual town agreements which supplement the over-all agreement.

The Court: They are agreements, then?

Mr. McKay: I think we will probably have some expert testimony on exactly what a deal sheet is. In the meantime, if you will reserve the expression——

Mr. Wright: Your Honor can see the terms.

The Court: I did not know what you meant by "deal sheet."

Mr. Wright: It is a sheet which sets forth the terms governing the picture, signed by each party.

[fol. 1267] Then the last of the Warner agreements are the two I referred to, both dated September 11, 1940, and marked W-35-A and W-35-B, respectively, which cover the '40-'41 product in towns which are specified on W-35-A, and that agreement—these agreements of September 11, 1940, are supplemented by Exhibit deal sheets marked Exhibits W-34, 1 to 80, inclusive.

(The deal sheets referred to were received in evidence as Plaintiff's Exhibit W-34, 1 to 80, inclusive.)

The Court: I note on these so-called deal sheets that at the bottom, at least on all of these, numbered 1 to 99, it is written "Subject to master agreement which prevails for season 1936-'37." Well, does that mean there was a master agreement covering these same theatres?

Mr. Wright: That master agreement, if your Honor please, is in evidence as W-5.

The Court: What I am getting at is the meaning when it says "subject to master agreement which prevails."

[fol. 1268] Mr. Wright: It means the terms on the deal sheet are not complete in themselves. They are only a partial statement. For the rest of the terms you have to look to the basic agreement.

Mr. McKay: If your Honor please, I don't think we ought to have the testimony of Mr. Wright. I think it is very essential that it should be established.

The Court: It isn't testimony anyway. I thought it would probably clear things up. Go ahead.

Mr. Wright: Did we have W-34, 1 through 80?

The Court: Yes. Let us see what we had before.

Mr. Wright: I think not. W-4, 1 through 99, and W-34, 1 through 80, are deal sheets, which relate to the 1940-'41 season, each for a separate town or theatre, and I think that takes care of the Warner documents produced by Schine, which we will offer. We will probably supplement this offer later with a further agreement produced by the distributor, which is the master agreement for the prior seasons, but that won't be identified until the distributor [fol. 1269] representatives are here on Thursday and Friday.

The Court: All right.

Mr. Wright: We will next offer the Loew 4-year deal L-1.

Mr. McKay: Just a minute. Your Honor, in order to avoid hopeless confusion in the keeping of these exhibits in an orderly fashion, I would like first to get my Warner exhibits back so I can put them back in order where I will be able to find them again, if they are ever called for, before I start producing documents from another company, otherwise some time during a stage of the trial there will be an exhibit called for and I won't be able to find it.

The Court: Of course, they hand the exhibits to the Court.

Mr. Wright: We have no objection to Mr. McKay retaining custody of the exhibits, providing they are available.

Mr. McKay: They will be available at all times. I understood the rule here was that each party was charged with the custody of exhibits assigned to him.

The Court: I don't know that there are any rules on the subject.

Mr. McKay: The point is the availability of the papers. [fol. 1270] The Court: There are a good many here that are numbered here.

Mr. Wright: I wanted to point out that they will have to be marked by the reporter.

The Court: Yes.

Mr. Wright: Could we have L-1?

The Court: That is the Loew agreement, you mean?

Mr. Wright: Yes, that is the Loew franchise covering four seasons.

Mr. McKay: You are finished with Warner now?

Mr. Wright: Yes.

Mr. McKay: Your Honor, I have here the paper marked L-1 which seems to have been inspected by the plaintiff, but I note that it hasn't been signed by either party and it contains numerous pencil notations, so while I am producing it as L-1, I am not prepared to concede its authenticity. No question was raised at the time it was inspected by the plaintiff.

Mr. Wright: We certainly don't question. It isn't our position to question the authenticity of anything that the defendants themselves produce. We assumed that when our subpoena called for this four-year agreement, dated [fol. 1271] October 1, 1936, and this agreement that was produced was marked L-1, that that was what was asked

for. Now, if it isn't the agreement, we ought to have a document that is the agreement.

Mr. McClennen: Where a paper is produced in this way, bearing no signatures, no question is made about the authenticity of what it is, namely, that it is a document signed by nobody, that came from our files.

The Court: Where is the one you were notified to produce as the agreement?

Mr. McKay: Your Honor, I am just as much surprised as Mr. Wright was in this. I wasn't present at the inspection. I would have assumed some question would have been raised at that time. If I had been there I would have raised it myself.

The Court: Where is the agreement?

Mr. McKay: That I do not know and I cannot tell until I am able to get in touch with Mr. Antevil. In going over this thing last night I saw this marked L-1 and I put it in its proper place, but it is not signed.

The Court: Is it signed by any party?

[fol. 1272] Mr. McKay: It isn't signed by either party and has pencil notations on it that indicate it might be followed by a corrected document. I will undertake to make a search for a signed copy and obviously a signed copy can be produced from Metro if we haven't got a signed copy, but the point I am making at this time is this document, which I had assumed to be an original document, turns out not to be one.

The Court: All right.

[fol. 1273] Mr. Wright: I have subpoenaed, of course, the signed document from Loew, but it won't be identified until Thursday or Friday.

The Court: That is the agreement?

Mr. Wright: Yes. Could we have Exhibits P-168 to P-238 which embodied the 2-year deal with Paramount, 1939-1940 and 1940-1941 seasons.

Mr. McKay: You don't need any more of these papers?

Mr. Wright: Of Loew, not at this time, no.

Mr. McKay: What are the numbers?

Mr. Wright: P-168 to P-239, inclusive, and also PP-1 to PP——

Mr. McKay: You better let me get one at a time. 168?

Mr. Wright: Yes.

The Court: 168?

Mr. Wright: P-168 to P-238.

Mr. McKay: The defendant produces the documents called for.

Mr. Wright: These exhibits P-168 to P-238, if the Court please, are all individual license agreements which cover individual towns. They are dated, I believe, in the month of February, 1940, and they cover the Paramount features for the 1939-1940 and 1940-1941 season in each case.

[fol. 1274] The Court: I thought you said 1939-1940 and 1941-1942?

Mr. Wright: No, it is a two-year deal, 1939-1940 and 1940-1941.

The Court: That is what I meant, yes.

Mr. McKay: That is a series of the groups S-11 and S-12.

Mr. Wright: S-11 and S-12, I take it is just another designation for the 1939-1940 and 1940-1941 seasons, respectively?

Mr. McKay: I take it that that is correct.

Mr. Wright: I would like to have Exhibits PP-1 through PP-10, inclusive.

Mr. McKay: Defendant produces the documents called for.

Mr. Wright: These exhibits PP-1 to 10, inclusive, are also individual agreements for the same two seasons, 1939-1940 and 1940-1941, which were executed in September, 1940.

Mr. McKay: There are three different dates on these agreements. There is a date in typewriting, 2/8/40; there is a date in pen and ink, 9/30/40, and there is a stamped date October 5, 1940, so I think that will probably require some explanation by oral testimony. I frankly do not know which is the right date. You can simply say they were executed.

Mr. Wright: At the moment we are not concerned with [fol. 1275] that. We would like to offer the Fox franchises.

The Court: Is that all of Paramount?

Mr. Wright: Yes, that is all at this time.

(Thereupon Government's Exhibits P-168 to P-238, individual license agreements received in evidence.)

(Thereupon Government's Exhibits PP-1 through PP-10, inclusive, individual license agreements were received in evidence.)

Mr. McKay: I have no Fox papers here, your Honor. I spent most of last night going over these three companies

in the anticipation that all of the documents were going to be offered, and it took me most of the night to do it.

The Court: What do you mean by "all"?

Mr. McKay: In addition to the documents Mr. Wright has offered, there are about five or six hundred more documents in those files which he has not seen fit to offer. I have the documents at the hotel, but I have not had a chance to——

The Court: Perhaps we can do something else.

Mr. Wright: If the Court please, I wrote Mr. McKay a letter ten days ago in which we told him we were agreeable [fol. 1276] to this procedure of not calling the witnesses, and we said the documents we proposed to offer at this time would be franchises and master agreements for each company. We also told him in the letter and suggested that we identify at this time the other material subpoenaed from Schine which had not yet been identified, and I am agreeable to proceeding with that if he is not ready to proceed with the franchise and master agreements.

The Court: Where are the others?

Mr. McKay: The other folders are in the hotel, and I had planned this evening to do the same with the other company.

The Court: Why not adopt the suggestion made by Mr. Wright?

Mr. McKay: I have only here the instruments for these three companies which have been identified, and I have in addition to that some other documents, not contracts, which also have been identified.

The Court: What contracts?

Mr. McKay: I have some documents, not exhibition contracts, which have been identified. I have this folder which [fol. 1277] also consists of papers called for by the subpoena which have been identified. Mr. Wright's letter to me started out by saying that he wanted all of the identified documents in court, and I thought I was keeping faith with him, and I spent the entire last evening getting these documents in shape.

The Court: Let us see what we have here, if we can save a little time now.

Mr. Wright: We also stated that the other previously identified documents we wanted to offer at this time were the agreements not to compete which had been executed at

various times between Schine and certain other operators in connection with the theatre purchases.

Mr. McKay: I believe I have those here.

Mr. Wright: If those are here, we will offer those.

Mr. McKay: All right, start calling for them. I have those here.

Mr. Wright: These documents have been identified with "S" prefixes standing for "Schine." I think we may as well keep the same numbers on them, too. S-68.

The Court: Are they marked "S-68"?

[fol. 1278] Mr. Wright: S-68.

Mr. McClennen: If your Honor please, this is a different class of exhibits, and may we do as in the other case, make a general objection, rather than deal with each paper specifically?

The Court: I think so. They are all of the same type, are they?

Mr. McClennen: These are not the same type.

The Court: I mean these particular ones?

Mr. McClennen: This group is of one type, as I understand it. That is, agreements made with reference to doing business by sellers of a theatre, for instance. That is an illustration, and our objection——

The Court: "Sellers of a theatre," what do you mean by that?

Mr. McClennen: A man in a theatre—I don't know that this would exactly characterize any of these papers, but it will give you a conception of the general type. A man sells a theatre, sells the goodwill of the theatre and agrees that he will not go into the theatre business in that town. The ground of the objection is that historically and by innumerable decisions an agreement of that kind, reason-

[fol. 1279] able in time, reasonable in area is just the kind of thing that is not in restraint of trade, but is essential to the sale of the goodwill of a business, and we object to those as not being material to this case.

Mr. Wright: If the Court please, the purpose of offering these agreements is simply to show an intention upon the part of the defendants to control and monopolize theatre operations wherever they acquired these theatres.

The Court: I shall receive them. S-68 to what? Objection overruled.

Mr. Wright: S-68 is an agreement——

The Court: 68 to what?

Mr. Wright: The ones identified, I think, go from S-68 through S-77.

Mr. McKay: They cannot be offered as a group, because they deal with different parties in each case.

Mr. Wright: I am just reading now what each one is.

Mr. McClennen: If your Honor please, I have had difficulty in outgrowing the conception that when a ruling is made against you, you ought to except, and I want to be sure [fol. 1280] it is understood that I do not have to.

The Court: Very well. That comes through practice more than anything else.

Mr. Wright: Exhibit S-68 is an agreement dated August 16, 1935, between J. Myer Schine, Louis Schine and Schine Chain Theatres, Inc., on the one hand and Maurice A. Shea on the other which relates to the City of Amsterdam, New York, and paragraph 13 of which is an agreement or undertaking on Mr. Shea's behalf not to compete——

Mr. McKay: If he is going to refer to the agreement at all, I suggest that he read it, otherwise let your Honor read it.

Mr. Wright: I will be glad to take the time if your Honor wants to hear each of these provisions at the present time. I merely wanted to point out for convenience where, in each of these agreements, the particular covenant we were interested in appears.

The Court: What he wants you to do is to read the covenant. If it appears in all of them, it is useless to read it.

Mr. Wright: Paragraph 13 "If Shea becomes the purchaser of the Schine stock, then, in that event, J. Myer [fol. 1281] Schine, Louis Schine and Schine Chain Theatres, Inc., jointly and severally covenant that they will not, directly or indirectly, or through affiliated corporations or subsidiary corporations, or partnership arrangements, own, lease or operate any motion picture theatre or other theatre in the City of Amsterdam, New York, for a period of ten years from the date of this instrument, individually or through agents, representatives or employees, nor will they buy or book pictures for exhibition in said city or in any other way enter into the theatrical or motion picture business in said city during said term. If on the other hand, Schine becomes the purchaser of the Shea stock, then, in that event, M. A. Shea agrees that he will not directly or indirectly, or through affiliated corporations or subsidiary corporations, or partnership arrangements, own, lease or

operate any motion picture theatre, or other theatre in the City of Amsterdam, New York for a period of ten years from the date of this instrument, individually or through agents, representatives or employees, nor will he buy or [fol. 1282] book pictures for exhibition in said city or in any other way enter into the theatrical or motion picture business in said city during said term."

(Thereupon agreement of August 16, 1935, between J. Myer Schine, et al., and Maurice A. Shea, was received in evidence and marked Government's Exhibit S-68.)

Mr. Wright: S-69 is an agreement between Henry Bieberson, Jr., and Belpik Theatre Corporation, one of the defendants, dated January 17, 1936, and relates to the Town of Athens, Ohio. The agreement in question is contained in the third paragraph which states——

The Court: It is not necessary to read it.

Mr. Wright: It may be understood it is read, but the third paragraph contains the provision we are interested in.

The Court: It refers to the same subject matter as the other?

Mr. Wright: That is right.

(Thereupon agreement dated January 17, 1936, between Bieberson and Belpik Theatre Corporation was received in evidence and marked Government's Exhibit S-69.)

[fol. 1283] Mr. Wright: S-70 is an agreement between Henry Bieberson, Jr., and Schine Delaware Corporation, which is dated January 17, 1936, which relates to the Town of Delaware, Ohio, and the covenant in question is contained in the middle paragraph on Page 2.

(Thereupon agreement between Henry Bieberson, Jr., and Schine Delaware Corporation, dated January 17, 1936, received in evidence and marked as Government's Exhibit S-70.)

Mr. Wright: Agreement S-71 is one dated August 16, 1937, between J. Myer Schine, Louis Schine, Schine Chain Theatres, Inc., on the one hand, and Maurice A. Shea, on the other which relates to Auburn, New York, and the particular paragraph in it is 7, I believe.

Mr. McKay: Yes, paragraph 7.

(Thereupon agreement between J. Myer Schine, et al., and Maurice A. Shea, dated August 16, 1937, was received in evidence and marked Government's Exhibit S-71.)

Mr. Wright: Then S-72. Isn't that 71?

Mr. McKay: That was 71, and the next one I see here is 73. Skip 72 for the time being.

[fol. 1284] Mr. Wright: All right. S-73 is an agreement between Seneca Theatres, Inc., Palace Lockport Corporation and Schine Realty Corporation, on the one hand, and Nikitas Dipson, John R. Osborne and Peter Grafiadas, on the other, dated October 10, 1936, which relates to the town of Lockport, New York.

(Thereupon agreement between Palace Lockport Corporation, et al., and Nikitas Dipson, et al., received in evidence and marked Government's Exhibit S-73.)

Mr. Wright: And S-74 is an agreement, dated January 11, 1939, between Jack Frisch and Sam Kaplan, on the one hand, J. Myer Schine and Louis Lazar on the other, which relates to theatre operation in the city of Maysville, Kentucky.

(Thereupon agreement, dated January 11, 1939, between Jack Frisch, et al., and J. Myer Schine, et al., received in evidence and marked Government's Exhibit S-74.)

Mr. Wright: S-75 is an agreement, dated January 4, 1939, between Charles Brown, Bessie O. Brown and Charles O. Brown, Jr., on the one hand, and Phoenix Amusement Company on the other, which relates to the town of Middlesboro, [fol. 1285] Kentucky.

(Thereupon agreement, dated January 4, 1939, between Charles Brown, et al., and Phoenix Amusement Company, was received in evidence and marked Government's Exhibit S-75.)

Mr. Wright: S-76 is an agreement dated July 16, 1940, between L. Edwin Hoppes, on the one hand, and Chesapeake Theatres Corporation and Wicomico Theatre Corporation, on the other, which relates to the town of Salisbury, Maryland, and the particular paragraph containing the covenant in question is found in the middle paragraph on the last page, next to the last page of the agreement.

(Thereupon agreement, dated July 16, 1940, between L. Edwin Hoppes and Chesapeake Theatres Corporation,

et al., was received in evidence and marked Government's Exhibit S-76.)

Mr. Wright: Next is S-77. That is a bill of sale for the James Theatre at Syracuse, New York, and is made by James Constantino to Schine Theatrical Co., Inc., and the covenant in question is on the second page of the agreement.

[fol. 1286] (Thereupon bill of sale by James Constantino to Schine Theatrical Co., Inc., was received in evidence and marked Government's Exhibit S-77.)

Mr. Whittemore: What is the date of that?

Mr. McKay: It is dated the 19th of June.

Mr. Wright: We haven't S-72?

Mr. McKay: What parties?

Mr. Wright: That is Buckman's agreement with respect to Delaware, Buckman's bill of sale. It may have been identified again in the course of the deposition.

Mr. McKay: The chances are it is in the deposition file. I have that file at the hotel and I will check on that. That is probably what has happened in that.

Mr. Wright: As I understand it, there are a substantial number of similar agreements which were submitted by us which have not yet been produced or identified, and, of course, we want to identify them.

The Court: Have you covered all those?

Mr. Wright: We covered all those produced and identified except for this S-72, but my understanding is we were told then this was not complete, that there were other agreements, and we would like to have those identified [fol. 1287] and offer them.

Mr. McKay: Mr. Antevil told me before he went to Gloversville these were all he had been able to find so far. I have to accept his assurance on that.

Mr. Wright: Some statement should be made because there are other agreements with respect to which we will offer secondary evidence. If this is all you have, that statement should appear.

Mr. McKay: I would prefer that Mr. Antevil make the statement to the Court on Thursday. I have no personal knowledge. I simply instructed him to get these papers and that was the report.

The Court: You have none here?

Mr. McKay: I have none here. I understand he has not

got any. I would prefer that statement be made by him, because he is the man that made the search.

Mr. Wright: At this time, if the Court please, there is nothing more I can say or do unless we can identify some of the material which has been subpoenaed or unless we can offer the identified R. K. O., Fox and Universal and [fol. 1288] Columbia franchises and master agreements, which apparently are not in court now. Maybe we can have a recess and get them over.

Mr. McKay: I have here a considerable number of other Schine exhibits that are marked with "S" that were identified and inspected. I don't know whether Mr. Wright wants these introduced or not. If he doesn't——

Mr. Wright: Not at this point.

Mr. McKay: All I can say is that I am taken by surprise by the fact that the rest of these documents I spent so much time on last night are not going to be offered. I knew I had more documents than possibly could be offered today, and I had anticipated that they were going to be offered in order. I am not saying this by way of criticism. I am just explaining the reason why there are not any more papers here right now.

The Court: Is there anything you have here, any other documents that you want to offer here now?

Mr. Wright: No, if the Court please. There is various interrogatory material that we would want to read into [fols. 1289-1291] the record, but I would rather not do that until we have the answer to our——

The Court: Grouped together. In the morning you will have the rest?

Mr. McKay: I will bring the rest.

The Court: Then we will take a recess until tomorrow morning. Will you have them all straightened out?

Mr. McKay: Yes, that is all I did last night.

The Court: That will give you part of this afternoon and evening as well to do that. You better talk to Mr. Wright and see just what he wants here.

Mr. Wright: I will be glad to give him a list of the exhibit numbers right now.

The Court: Give him all the information you can. Here are some papers here. You may want to keep them together.

Mr. McKay: Yes. May we have some procedure adopted as to how these exhibits are to be marked? I am perfectly willing to leave them with the stenographer.

The Court: We will recess until tomorrow morning.

(Whereupon an adjournment was taken to Wednesday, September 27, 1944, at 10 A. M.)

[fol. 1292] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al, Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, September 27th, 1944, at 10 A. M.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for Defendants.

[fol. 1293] PROCEEDINGS

Mr. Wright: On page 1264 of yesterday's record, Exhibit W-31, should read W-3. We will proceed in the order we gave you those yesterday. I think the first one is——

Mr. McKay: The first document you called for was F-1.

Mr. Wright: Yes, Fox.

Mr. McKay: I produce F-1, which is an agreement between Schine Enterprises, and subsidiaries and affiliated companies, dated August 5, 1936, and I might say there that the type written is 1937. It has been changed in pencil

to 1936, and relates to the 1936-'37, '37-'38, and '38-'39 product.

The Court: We had yesterday the Fox agreements, didn't we?

Mr. McKay: I don't think we had any Fox agreement yesterday.

Mr. Wright: I don't think we had any Fox yesterday.

The Court: What was S-68 and 67?

Mr. Wright: Those were agreements made by one or the other Schine defendants with other exhibitors containing covenants not to compete.

The Court: By Schine with other pictures?

Mr. Wright: No, by Schine with other exhibitors.

[fol. 1294] Mr. McKay: This agreement is signed by William Sussman, on behalf of Fox and George Lynch on behalf of Schine. Attached to the agreement is a letter dated February 24, 1937. That letter relates to the change in the date which I just called to your Honor's attention.

(Document handed to Mr. Wright.)

Mr. Wright: We offer it as F-1 in evidence.

The Court: What is that number?

Mr. Wright: F-1.

(The agreement and letter referred to were marked in evidence as Plaintiff's Exhibit F-1.)

The Court: What do you say that is, that Roman is just 1?

Mr. McKay: Yes, that is right. Your next is F-193.

The Court: Was that with Fox?

Mr. Wright: Yes. I think it would be more orderly if we followed F-1 with the deal sheets that relate to it.

Mr. McKay: I am just producing this because it was the next one you gave me.

Mr. Wright: On the contracts, yes. I think those are F-2 to F-123, according to my notes.

Mr. McKay: You did not ask for that. You asked for 124 to 214.

[fol. 1295] Mr. Wright: Those relate to the second franchise. The first are F-2 to 123.

Mr. McKay: I am awfully sorry, but here is the list you gave Mr. McClennen last night.

Mr. Wright: Well, we can pick those up later, but we do want F-2 to 123.

Mr. McKay: That is the reason they aren't here, because they weren't on the list.

Mr. Wright: Then I think we might as well proceed to put in F-193, if you have got that.

Mr. McKay: Yes, I produce a letter, dated June 8, 1939, addressed to Schine Enterprises Corporation and its subsidiaries and affiliates, signed by "Twentieth-Century Fox Film Corporation, by William Sussman", and accepted by Schine Enterprises by George Lynch, which relates to the 1940-'41 and 1941-'42 seasons.

Mr. Wright: I think you omitted 1939-'40.

Mr. McKay: Oh, yes, 1939-'40. Of course, in so far as this relates to any dealings after May 19, 1942, it is inadmissible on that ground.

Mr. Wright: We offer it in evidence.

(The letter, dated June 8, 1939, to Schine Enterprises, signed by Twentieth-Century Fox, referred to, was received in evidence and marked Plaintiff's Exhibit F-193.)

[fol. 1296] The Court: You call this an individual license agreement?

Mr. Wright: No, this is a so-called master agreement, covering three seasons on the franchise.

Mr. McClennen: If your Honor please, as I said yesterday, we are not in agreement as to the characterization and I take it I needn't interrupt for that purpose.

The Court: When you referred to a master agreement I assumed it related to an agreement over a period of years.

Mr. McClellen: The master agreement, as he described it, was one relating to more than one theatre and a franchise for more than one year. I don't think we are in discord as to the common use of the term "Master agreement" but the franchise is the one.

The Court: Whatever they are called, it does not make any difference, it is a question of what was done.

Mr. McClellen: I want to say this, once and for all, so it will apply whenever Mr. Wright says "franchise" it will be understood that we are not in accord on that description.

Mr. McKay: I produce——

The Court: There is just one question, Mr. Wright. [fol. 1297] When you speak about a date, you mean by mas-

ter agreement one made with an individual company for several years or would it have to be an agreement with several companies?

Mr. Wright: No, as we use the term, the master agreement would be with one company for the exhibition of its films during one season, in numerous towns and theatres owned and controlled by the defendants. The franchise, as we use the term, would be a similar agreement, but cover more than one motion picture season.

Mr. McKay: I produce a series of individual contracts marked F-124 to F-214, inclusive. These contracts are dated January 23, 1939, and are all between Twentieth-Century-Fox Film Corporation and some Schine companies and they are not all the same date. I will correct that statement, your Honor. They relate to the seasons of 1939-'40, '40-'41 and '41-'42. I have to inform your Honor that in the folder marked 123 and 124 there is a notation "Out" and the relevant contracts are not there, and there is no explanation why they are not there. I am endeavoring to [fol. 1298] locate them and will supply them if I am able to find them.

The Court: It is 123?

Mr. McKay: It is 123 to 214, but 123 and '4 are missing, but that is what the request calls for. For the convenience of the stenographers.

The Court: You are offering now 125?

Mr. McKay: 125, yes, but for the convenience of the stenographer I might point out here, he will note that 193 is not in this pile. That is because 193 has already been introduced as this so-called master agreement.

Mr. Wright: Then we offer F-125 to F-214, in evidence, and I understand they are so marked. It should be noted, I think, for your Honor's information, that F-125 is an agreement which relates to the master agreement, or to the three-year deal of 1936 which has been identified as F-1. The rest of these agreements, 126 through 214, refer to the three-year agreement dated June 8, 1939, which is in evidence as F-193.

The Court: I thought you said these were dated January 29, 1939?

Mr. McKay: That was the first agreement. The others [fol. 1299] are dated June 6th, or some time in June. I note there is one June 22nd.

The Court: January 29, 1939, relates to 123 and 124, is that the point?

Mr. McKay: No, January 23, 1939, relates to F-125, and that in turn relates to F-1.

The Court: Yes, I understand.

Mr. McKay: The others are dated in June, not all on the same day, June of 1939, and relate to F-193.

(The series of individual contracts referred to were received in evidence and marked Plaintiff's Exhibits F-193 to F-214, inclusive, with the exception of F-193.)

Mr. Wright: We might as well put them in in chronological order. The next would be R-42 and R-43.

The Court: Is that No. 193 or 1-93?

Mr. McKay: 193.

Mr. Wright: F-193 is the designation.

The Court: Go ahead.

Mr. McKay: I produce R-42, which is an agreement signed by R. K. O. Distributing Corporation by some C. H. Halligan, and R. K. O. Distributing Corporation by Henry T. Dixon, and apparently was intended to be signed by George Lynch for Schine Theatrical Co., Inc., but he didn't [fol. 1300] sign it. It is dated October 29, 1934, and relates to the 1934-'35 pictures of R. K. O. Attached to that is R-33, which is a letter from R. K. O. Distributing Corporation.

Mr. Wright: R-43.

Mr. McKay: R-43, a letter from R. K. O. Distributing Corporation to George Lynch, Schine Theatrical Co., Inc., dated November 1, 1944.

Mr. Wright: We offer R-42 and R-43.

(The agreement dated October 29, 1934, referred to was received in evidence and marked Plaintiff's Exhibit R-42.)

(The letter from R. K. O., dated November 1, 1944, referred to was received in evidence and marked Plaintiff's Exhibit R-43.)

Mr. Wright: If there is going to be any point made about the fact that Lynch's signature does not apear here, I suppose we will have to go out for the copy in the distributors' files, which has that on.

Mr. McKay: I don't really question the fact. He probably signed it. But I do not see his signature there. It

was his copy and I suppose he may have felt he didn't need to sign it.

[fol. 1301] What is the next?

Mr. Wright: Then have you R-3 through R-34? I think those are the contracts which relate to this agreement R-42 and 43.

Mr. McKay: My first one is R-4, it runs to R-34.

Mr. Wright: Haven't you R-3?

Mr. McKay: No, I wasn't able to find R-3, and also R-19 is missing, and I put in a yellow sheet there.

The Court: Is this 34 or 44?

Mr. McKay: 34. These are individual contracts.

The Court: Which one is next?

Mr. McKay: R-3 is next, which is missing, and R-19 is missing.

The Court: All right.

Mr. McKay: These are individual contracts between one or more of the Schine Companies and R. K. O., dated in October, 1934, and relating to the 1934-1935 product.

The Court: They all relate to the two years?

Mr. McKay: That is only one year.

The Court: I mean one year, but I mean 1934-'35?

Mr. McKay: Yes.

Mr. Wright: We offer those in evidence.

[fol. 1302] (The individual contracts relating to 1934-1935 product referred to were received in evidence and marked plaintiff's Exhibits R-4 to R-34, inclusive, with the exception of R-19, which is missing.)

Mr. Wright: The next, I think, is R-20.

Mr. McKay: R-20 is a letter, dated October 18, 1935, to Mr. Myer Schine, Schine Enterprises, and signed by E. L. McAvoy, Eastern Sales Manager. It is written on the stationery of R. K. O. Distributing Corporation.

The Court: That is R, what?

Mr. McKay: R-20.

Mr. Wright: And that relates to the pictures released for the 1935-'36 season?

Mr. McKay: Just a minute. Well, this doesn't say to what season it relates. It says "The balance of the deal is to be the same as the '34-'35 deal." It doesn't specifically designate the season to which it relates.

Mr. Wright: We offer R-20 in evidence.

(The letter, dated October 18, 1935, to Myer Schine, referred to, was received in evidence and marked Plaintiff's Exhibit R-20.)

[fol. 1303] Mr. Wright: The next is R-1.

Mr. McKay: This is an agreement dated November 20, 1936, and it is apparently intended to be signed by four different people representing RKO. None of those people signed it. Instead, the signature E. L. McEvoy appears across the page without any designation of his position. Signed by George Lynch, Schine Theatrical Company, Inc., and apparently related to a deal signed for the year 1936-1937 pictures, adding certain clauses to the agreement.

Mr. Wright: We offer R-1.

The Court: November 20, 1936?

Mr. Wright: Right.

The Court: How could that refer to 1936-1937 pictures?

Mr. Wright: That season began September 1st, 1936 and ended the following August. It was made during the season.

The Court: Oh, I was thinking it was made in the spring.

(Thereupon agreement dated November 20, 1936, between RKO and Schine Theatrical Company, Inc., received in evidence and marked Plaintiff's Exhibit R-1.)

Mr. McKay: I found R-3 which apparently had been with-[fol. 1304] drawn for use in an arbitration proceeding. It was in a separate place.

The Court: R what?

Mr. McKay: R-3, the contract I said I had not been able to find. It was in a separate folder, withdrawn for an arbitration proceeding, apparently. A contract for 1934-1935 products for the Palace or Jefferson Theatres in Auburn, between RKO——

The Court: Where?

Mr. McKay: Palace or Jefferson Theatres, Auburn, and it is signed by RKO and by the Mamver Corporation.

Mr. Wright: We offer R-3.

(Thereupon contract between RKO and Mamver Corporation, received in evidence as Plaintiff's Exhibit R-3.)

Mr. McKay: That finishes RKO?

Mr. Wright: No, I don't think you have produced—was R-1 offered?

Mr. McKay: Yes.

Mr. Wright: The next I think would be the deal sheets relating to R-1. That is R-2 (1 through 51).

Mr. McKay: R-2 (1 through 51) consists of a series of [fol. 1305] so-called deal sheets. They are dated 11/20—here is one 11/19/36. A number of them are dated November 30, 1936, but they were all dated in November. They are signed by E. L. McEvoy and George Lynch. They did not make any specific reference to the season's product to which they refer.

Mr. Wright: Don't they refer to the other agreement?

Mr. McKay: They do not refer to anything.

Mr. Wright: I take it these are produced, are they not, in response to our subpoena which called for the agreements which were a part of those season's deal?

Mr. McKay: They are produced in accordance with your subpoena which called on us to produce all deal sheets——

Mr. Wright: Which related to the——

Mr. McKay: You did not limit it to any special season.

Mr. Wright: Let us take a look at it and see if we can straighten it out here.

Mr. McClennen: If your Honor please, while this is being looked up, could I ask your Honor to glance at this as indicating what it is? (Handing document to the Court.)

Mr. Wright: Paragraph 23 of our subpoena calls for the [fol. 1306] license agreement, contract or master agreement dated November 20, 1936, relating to the exhibition in certain towns in the States of New York and Ohio of feature pictures distributed by R. K. O. Radio Pictures, Inc., and all modifications, alterations and amendments thereof, and it is my understanding that the document that is in evidence as R-1 was produced in response to that paragraph 23, isn't that correct?

The Court: It is apparently the same date.

Mr. Wright: Yes, R-1 is the deal which covered the 1936-1937 season and is dated November 20, 1936.

The Court: These sheets are dated the same date?

Mr. McClennen: Some of them are. Anyway a number of them are dated.

Mr. Wright: Our paragraph 24 calls for all deal sheets to which the license agreement, contract or master agreement described in paragraph 23 refers or relates or which refer or relate to the aforesaid license agreement, contract or master agreement. I take it these deal sheets that have

been identified here as R-2 (1 through 51) are the sheets that were produced in response to our paragraph 24, are [fol. 1307] they not?

Mr. McKay: I haven't any actual doubt that they do relate to the 1936-1937 product, but I felt I ought to call your Honor's attention to the fact on their face they make no reference to any product.

Mr. Wright: I take it their production in response to this subpoena establishes these deal sheets represent the deals that were made.

The Court: Counsel states those are all that he has. Are they?

Mr. McKay: If we have any relating to that season, those are the ones.

Mr. Wright: We offer those in evidence.

(Series of deal sheets thereupon received in evidence and marked as Plaintiff's Exhibit R-2 (1 through 51).

Mr. McKay: May I state there is one sheet missing there; sheet No. 49 is missing.

The Court: Except R-49.

Mr. McKay: It would be R-2 (49).

Mr. Wright: Next I think is R-37 (1 through 83).

Mr. McKay: These are a series of so-called deal sheets signed by E. L. McEvoy and George Lynch and they do con- [fol. 1308] tain a reference to the product they refer to, seasons 1938-1939, 1939-1940 and 1940-1941.

The Court: What is that number, R-what?

Mr. McKay: R-37 (1 to 82).

The Court: They purport to be what?

Mr. McKay: They are the so-called deal sheets. That is what they are designated on the top.

The Court: Between R. K. O.——

Mr. McKay: Between R. K. O. and Schine, and they refer to the seasons' product 1938-1939, 1939-1940 and 1940-1941.

Mr. Wright: And they also refer to the master agreement dated 11/20/36 which is in evidence as R-1.

Mr. McKay: Some of them don't have that reference, but a great number of them do. Up to No. 60, refer to the master agreement of 11-/2-/36.

Mr. Wright: We are not particularly interested at this point which ones do and which ones do not. Whatever the fact is appears on their face.

Mr. McKay: Some of them do not refer to all three sea-

sons. I want to pick those out and mention them specially. 81 is only for the 1940-1941 season; 82 is only for the 1940-[fol. 1309] 1941 season; 83 was not called for—83 is only for the 1940-1941 season.

Mr. Wright: Yes, I called for 83. He originally described in producing it as 1 to 82. We had asked for 1 to 83. Anyway, we are offering one through 83.

Mr. McKay: 78 is for the 1939-1940 and 1940-1941 season. 37 is for the 1939-1940 and 1940-1941 season. 80 is for the 1939-1940 and 1940-1941 season.

The Court: Your point in this connection is they do not all refer to the same period of time?

Mr. McKay: Except for the exceptions I am stating, they refer to 1938-1939, 1939-1940 and 1940-1941.

Mr. Wright: What he is referring to are sheets which cover additions to the deal during the three-year period. Towns that came in later, of course, the deal was only for the later years.

Mr. McKay: They are all included in the three seasons, but these particular sheets do not cover all three seasons. They cover one or two of them.

The Court: That is what I was referring to.

[fol. 1310] Mr. McKay: 76-A is 1939-1940 and 1940-1941. 76-B is 1938-1939. 71 is 1940-1941. 66 is 1939-1940 and 1940-1941. 67 is 1940-1941 and 61 is 1940-1941. The others all cover the three seasons.

Mr. Wright: They are all offered.

(Series of so-called deal sheets between R. K. O. and Schine were received in evidence and marked Plaintiff's Exhibit R-37 (1 through 83.)

Mr. Wright: Columbia, I think, is next on the list, C-100 and C-101.

Mr. McKay: C-100 is dated at Gloversville October 17, 1938. It is signed by Louis Weinberg, Columbia Picture Corporation and George Lynch for Schine Enterprises Corporation. I think it is not designated as anything. I think I better read the opening sentence. It says "It is understood and agreed that the following clauses are to become part and parcel of Columbia Contract for the 1938-1939 and 1939-1940 seasons. Then it proceeds to list eight clauses. Apparently there is a modification or supplement to the Columbia contract.

[fol. 1311] The Court: C-100?

Mr. McKay: That is C-100.

Mr. Wright: We offer that.

(Thereupon document entered into between Columbia Pictures Corporation and Schine Enterprise Corporation, dated October 17, 1938, was received in evidence and marked as Plaintiff's Exhibit C-100.)

Mr. Wright: C-101, I think is a modification of C-100. This is the next document, C-101.

Mr. McKay: C-101 is a letter dated November 28, 1938. It is addressed to Schine Enterprises Corporation at Gloversville, attention of George Lynch, signed by Columbia Pictures Corporation by Louis Weinberg, Schine Enterprises Corporation by George Lynch, and it has attached to it a specimen form of the Columbia standard exhibition contract.

The Court: As part of the exhibit?

Mr. McKay: Yes, it refers to that. I don't know but what it might be well to read the entire letter. It is short.

Mr. Wright: It is all right with me if you want to read it.

Mr. McKay: It says: "In order to eliminate the neces- [fol. 1312] sity of drawing up and executing individual contracts for each situation and theatre in your circuit for our 1938-1939 and 1939-1940 product, it is agreed as follows: The complete deal shall consist of (a) the deal sheets dated October 17, 1938 and signed by myself for Columbia and by your Mr. George Lynch for Schine. (b) All the terms, provisions and conditions of the Columbia form of exhibition contract, copy of which is attached hereto. (c) Eight clauses contained in the two-page type-written agreement between you and us dated October 17, 1938."

That is C-100. "In the event that Columbia form of exhibition contract is inconsistent with the provisions specified in the typewritten agreement dated October 17, 1938, then it is agreed that the provisions of the typewritten agreement shall prevail and apply," and it provides for the possibility of selling to other theatres.

Mr. Wright: We offer C-101.

(Thereupon letter dated November 28, 1938, addressed to Schine Enterprises Corporation, signed by Columbia Pictures Corporation received in evidence and marked Plaintiff's Exhibit C-101.)

[fol. 1313] Mr. Wright: C-102 (1 through 81) are the deal sheets referred to in C-101.

Mr. McKay: What is the next one?

Mr. Wright: C-102 (1 through 81).

Mr. McKay: This presents the same situation as appeared in the R.K.O. deal sheets. The exhibits consist of so-called deal sheets signed by, apparently, two people, neither of whose signatures are legible to me. In some cases only one person signed. In that case it is Weinberg, but they are Columbia deal sheets and for the most part refer to the 1938-1939 and 1939-1940 product. Some of them, however, only refer to the 1939-1940 product.

Mr. Wright: We offer those in evidence.

(Thereupon deal sheets of Columbia received in evidence and marked Plaintiff's Exhibit C-102 (1 through 81).

Mr. Wright: The next is a three-year deal for the 1940-1941, 1941-1942 and 1942-1943 seasons, marked C-180 for identification.

Mr. McKay: Now, with respect to that, of course, the 1941-1942 and 1942-1943, that is not admissible or relevant [fol. 1314] here. You recall these franchises were affected by the temporary order after May 19, 1942.

Mr. Wright: We take it the entire contents are relevant and we are offering it all.

Mr. McKay: We note our objection on that ground, if your Honor please. It is an agreement dated November 19, 1940, which is signed by Columbia Pictures Corporation, Louis Weinberg, Schine Enterprises Corporation, George Lynch. The agreement itself does not specify the season's product, but schedule A annexed to it specifies 1940-1941, 1941-1942 and 1942-1943, and as in the other instance there is a sample copy of the Columbia exhibition contract annexed.

Mr. Wright: We offer C-180 in evidence.

(Thereupon agreement dated November 19, 1940, between Columbia and Schine Enterprises Corporation received in evidence and marked as Plaintiff's Exhibit C-180.)

The Court: What does the letter itself purport to be? There is attached a form?

Mr. Wright: Yes, it consists of special terms which are granted throughout the circuit. That is what the letter

[fol. 1315] covers principally, special provisions which supersede those in the standard form.

Mr. McKay: I object to the use of the word "granted". I say they are imposed.

Mr. Wright: C-181 (1 through 79) the deal sheets which relate to C-180.

The Court: C-181, you say?

Mr. Wright: Yes, these deal sheets are marked C-181, each sheet being individually marked, or numbered, 1 through 79 for identification.

The Court: They are carried as one exhibit?

Mr. Wright: Yes, it is all carried under C-181.

The Court: You claim those relate to other years, other than 102?

Mr. Wright: These are the deal sheets for the same season, three years, 1940-1941, 1941-1942 and 1942-1943 as are covered by the agreement that is marked in evidence as C-180. These are the three-year deal beginning in 1940.

The Court: After 1938?

Mr. Wright: That follows the two-year deal which was made for 1938-1939 and 1939-1940.

[fol. 1316] Mr. McKay: Your Honor, all those deal sheets, that is 181, 1 to 79, cover the 1940-'41, '41-'42 and '42-'43 products, except No. 181-52, which is a deal sheet for a single picture, "Mr. Smith Goes to Washington, second-run Lexington". That is a '39-'40 picture.

The Court: Of what significance is that?

Mr. Wright: It is made at the same time and it has the same date. It is apparently part of the same deal.

Mr. McKay: It was made at the same time but it wasn't part of those deals. Those terms refer to first run and this was a second run contract.

The Court: The point you are making is it refers to the second run instead of a first run?

Mr. McKay: Yes. It says right on the paper "Second run".

Mr. Wright: We offer 181, 1 through 79.

(The deal sheets referred to were received in evidence and marked Plaintiff's Exhibit C-181, 1 through 79, inclusive.)

Mr. Wright: And then we come to Universal. Do you have U-137?

Mr. McKay: U-137 is an agreement, dated September 7th, I think it is 1938, signed by Dave Miller, Universal Pictures, [fol. 1317] Inc., and George Lynch, Schine Enterprises Corporation, and refers to certain deal sheets, signed August 26, 1938, to which it adds four clauses.

Mr. Wright: We offer that in evidence.

(The agreement, dated September 7, 1938, was received in evidence and marked Plaintiff's Exhibit U-137.)

Mr. Wright: The deal sheets referred to I believe are U-137, 1 to 75, inclusive.

Mr. McKay: That is 137, that number really should have been 138, 1 to 75.

Mr. Wright: It is already marked 137. It doesn't make any difference.

Mr. McKay: These sheets relate to the 1938-'39 season and are dated—up to 137-69 they are dated August 26, 1938. 70, 71 and 72 are dated 11-10-38 and 73 and 74 are dated April 17, 1939.

The Court: What is that?

Mr. McKay: 73 and 74 are dated April 17, 1939. 75 is dated 10-21-38.

Mr. Wright: We offer those in evidence.

(The deal sheets referred to were received in evidence and marked Plaintiff's Exhibit U-137, 1 to 75 inclusive.)

[fol. 1318] Mr. Wright: The next document is U-207, a three-year deal, for 1939-'40, 1940-'41 and '41-'42.

Mr. McKay: 207 is an agreement dated June 27, 1939, signed by Dave Miller, Universal Pictures, Inc., and George Lynch, for Schine Enterprises. It refers to certain deal sheets signed on June 27, 1939, to which it adds seven clauses, but it doesn't make any reference whatsoever to the year's product which it covers. It may appear in the deal sheets but it doesn't appear in this.

Mr. Wright: We offer U-207 and also U-207, 1 through 89, which I understand to be the deal sheets referred to there.

(The document, three-year *year*, dated June 27, 1939, referred to was received in evidence and marked Plaintiff's Exhibit U-207.)

(The deal sheets referred to were received in evidence and marked Plaintiff's Exhibits U-207, 1 through 89.)

Mr. McKay: All of those deal sheets are dated 6-27-39, except as follows: No. 85 is dated December 15, 1939; No. 61 is dated March 4, 1940, No. 62 is dated January 22, 1941; No. 53 is dated December 15, 1939; No. 52 is dated December [fol. 1319] 18, 1941; No. 50 is dated December 15, 1939; No. 51 is dated December 5, 1940; No. 49 is dated December 15, 1939; No. 34 is dated October 3, 1939; and No. 89 is dated December 15, 1939. All of the sheets cover the 1939-'40, '41-'42 and '42 product, except No. 51, which covers only 1940-'41; No. 52, which covers only '41-'42 and No. 62 which covers only 1940-'41.

Now, I renew my observation that as to any——

The Court: What do you claim is the significance in the different dates?

Mr. McKay: Well, I simply want to have the—you see, this letter refers to deal sheets signed on a certain date and a great many, a majority of them, were signed on that date.

The Court: I mean, is there any significance in the fact they are signed on different dates?

Mr. McKay: There may be. I think that will require some explanation.

Mr. Wright: We are offering U-207, 1 through 89.

The Court: They have been received.

Mr. Wright: That, I think, finishes up the offering at [fol. 1320] this time of the previously identified material. I think we should next identify the United Artists' master agreements that were subpoenaed and haven't yet been produced or identified. This subpoena that I am referring to was returnable August 15th and paragraph 1 reads as follows: "All franchise and master agreements between you and United Artists Corporation for the exhibition of feature motion picture films released to said defendant exhibitor and distributed by United Artists Corporation during the motion picture season 1931-'32 to 1940-'41, inclusive."

Then it has a foot-note saying "as used herein the term franchise includes any license agreement for the exhibition of film for a period of more than one year. As used herein the term master agreement includes any agreement covering the exhibition of a feature motion picture film in a group of ten or more towns."

Mr. McKay: Your Honor, all the United Artists agreements are here in court. I point out that Mr. Wright's [fol. 1321] definition, arbitrary definition, of a master agree-

ment has made it necessary for me to take each separate folder and search through it to see whether it applies to ten or more towns. United Artists doesn't sell pictures the way the other companies do. They sell a single picture at a time and on a separate contract. On occasion they will annex to the contract a rider like that, giving one or more towns, and it is quite a task to do that. Now, I have started on it and I have got some of them here, and they are all in court, but it will take a matter of three or four or maybe five more hours to complete pulling those contracts out.

The Court: Well, irrespective of the language of the subpoena there, first, do I understand the subpoena is directed only to master agreements?

Mr. Wright: And franchise, both.

The Court: Why not just proceed?

Mr. Wright: We can at least identify what he has.

Mr. McKay: You can identify the ones I pulled out and [fol. 1322] I will continue to pull out the others. The point I make is that they take a separate picture and make a complete folder out of it.

The Court: What I was asking, is there any difference in what we call it? The agreements show what they are, whether they relate to several theatres, one theatre, a single year or a period of years.

Mr. McKay: I have no objection to doing the work. I am just pointing out it will take four or five more hours to finish it.

Mr. Wright: As long as these are only going to be marked for identification I think that the marking could probably be done outside of the presence of the Court. Perhaps we could have a recess and then mark them, and it would save a considerable amount of time.

The Court: You speak about taking four or five hours. What do you mean by that?

Mr. McKay: You see what I have left here is a few papers out of a great batch that were in this contract that he did not want me to bring in, and I have to go through each [fol. 1323] one of these folders and sort them out and see whether they do cover ten or more towns, and if they do then I have got to take the other contracts out. In many cases it has been a very close proposition. Some of them cover nine towns. I would be very happy to have him take the whole batch of contracts and put them in. They are all here.

Mr. Wright: I would suggest that during the recess perhaps we could simplify your task for you.

The Court: That is what I had in mind.

Mr. McClellen: If your Honor please, there is a considerable quantity that Mr. McKay has been able to get out that exactly comply.

The Court: I see your point.

Mr. McClellen: Then I take it that there is no occasion for marking them for identification. They can now be either put in or rejected, as Mr. Wright may determine, and if they are put in they have got one marking as an exhibit in this case now.

Mr. Wright: These that we have not seen we, of course, would like to look at them before we offer them. I would [fol. 1324] suggest we identify them first outside of the court and then those that we decide to offer we can come in and offer them.

Mr. McClennen: If you are going to identify them would it not be better to relieve Mr. McKay of this great work of picking out and identifying everything?

Mr. Wright: I say, we may be able to do that during the recess.

The Court: I think we could if you have got the papers here.

Mr. Wright: We can go over them with Mr. McKay.

The Court: Either offer them all or pick out those that the subpoena is directed to.

Mr. McClennen: They are all here.

The Court: When do you want to do that—now?

Mr. McClennen: Those that have been picked out, we can go right forward before your Honor on. Then as to the rest it can be done outside.

Mr. McKay: I have some more papers that are called for by the subpoena.

Mr. Wright: I think we had better proceed with those.

Mr. McKay: I went through those last night. We might finish them up this morning and devote the afternoon, in the Court's absence, to getting rid of United Artists.

[fol. 1325] The Court: Just as you agree.

Mr. Wright: The second paragraph of the subpoena calls for all inter-office correspondence and all written communications between the aforesaid parties relative to the agreement described in paragraph 1 hereof which

were written during the period from August 1, 1931, to September 1, 1941.

Mr. McKay: If there are any of those they will be attached to the contract. Other than that there are not any.

Mr. Wright: You mean other than those files that we are going to examine?

Mr. McKay: Yes.

Mr. Wright: The third paragraph calls for all written agreements made with one or more of the parties named below in connection with the acquisition of the respective theatres listed below. Then there is a list of individuals, a list of theatres, and a list of locations. The first one is John Bahas, Ohio Theatre, at Ashland, Ohio.

Mr. McKay: Mr. Wright, do you have any objection, as long as these are all on our list, if I take them in the order that I find them here?

[fol. 1326] Mr. Wright: Not at all.

Mr. McKay: The Strand Theatre, Seneca Falls.

Mr. Wright: These refer to agreements made between Schine and parties from whom they acquired theatres, other exhibitors. I think we had better go back now to the regular exhibit numbers in the case.

Mr. McKay: Your Honor, with respect to this series of exhibits, we note the objection that they are inadmissible because they relate to a local transaction, to wit, the acquisition of a particular theatre in a particular town, and therefore have nothing to do with interstate commerce.

Mr. Wright: Inasmuch as we have not seen these exhibits either, I think that these might well be identified during the recess and then those that we decide to offer we will offer.

Mr. McKay: Then you do not want to go forward with it?

Mr. Wright: We want to go forward with it and I suggest we mark them, examine them during the recess, then we will offer them.

The Court: For identification, you mean?

Mr. Wright: Yes.

Mr. McKay: There is one other point, your Honor. That [fol. 1327] is, practically they are all originals and part of our permanent records in each town, and they are necessary to our recording system. I would like, with the Court's permission, after they have been marked, to withdraw them one at a time or two or three at a time and have them photostated and substitute the photostat for the original.

Mr. Wright: That is entirely agreeable to us. We have no objection to that.

Mr. McKay: I produce an agreement, dated September 16th, between Harry L. Berenstein, Benjamin M. Berenstein, Julius Berenstein and Louis Henry, as sellers, and Schine Theatrical Co. as buyer. This relates to the acquisition of the capital stock of Berenstein Theatres, Inc.

The Court: What has become of the other one, the Strand Theatre, Seneca Falls?

Mr. McKay: Berenstein Theatres owned the Strand Theatre.

Mr. Wright: I will ask to have this marked for identification.

The Court: Mark it Exhibit 80 for identification.

(The agreement, dated September 16th, between Berenstein and Schine Theatrical Co., referred to, was marked as Plaintiff's Exhibit 80 for identification.)

[fol. 1328] Mr. McClennen: This is not yet in evidence, as I understand. It is merely for identification?

Mr. Wright: No, it is merely identified.

Mr. McKay: Malone, New York.

The Court: What is the name of the theatre?

Mr. McKay: The Plaza Theatre. We produce an indenture of lease, dated February 14, 1941, between Michael Boumansour and Schine Theatrical Co., Inc., which covers the Plaza Theatre, Malone, N. Y.

The Court: Leased to Schine?

Mr. McKay: Yes, sir. Boumansour is the landlord.

Mr. Wright: I will ask to have that marked Exhibit 81 for identification.

(The indenture of lease, dated February 14, 1941, between Boumansour and Schine Theatrical Co., Inc., referred to was marked as Plaintiff's Exhibit 81 for identification.)

Mr. McKay: I have here what seems to be a copy of an agreement between Boumansour and Schine Theatrical Co., Inc., dated January 21, 1941, also relating to the Plaza Theatre, but this agreement is signed only by Schine. I have no way of telling whether Boumansour signed it or not.

[fol. 1329] The Court: Is it something different from Exhibit 81 you mean?

Mr. McKay: It would apparently cover the making of that lease, but I do not think it is a proper exhibit at this time until we ascertain whether Boumansour signed it.

Mr. Wright: We will have it marked for identification anyway as Exhibit 82.

(Memorandum of agreement, dated January 21, 1941, between Boumansour and Schine Theatrical Co., Inc., referred to was marked as Plaintiff's Exhibit 82 for identification.)

Mr. McKay: William G. Croucher, Crescent Theatre, Newark, Ohio. I produce an agreement dated August 23, 1940, between William G. Croucher and Aldis P. Croucher, as parties of the first part, and Dominion Operating Co., Ltd., as parties of the second part, which provides for a leasing to Dominion of a building known as the Newark Theatre. That is now known as the Crescent Theatre.

The Court: Dominion is a subsidiary?

Mr. McKay: Dominion is a Schine subsidiary.

Mr. Wright: I will ask to have that marked Exhibit 83 for identification.

[fol. 1330] (The agreement, dated August 23, 1940, between Croucher and Dominion Operating Co., Ltd., referred to was marked as Plaintiff's Exhibit 83 for identification.)

Mr. McKay: In reference to H. C. Moss of Penn Yan, N. Y., the Elmwood Theatre, I have here the file on that theatre and I am unable to find any agreement with Mr. Moss.

Mr. Wright: If Counsel is referring to some agreement with a Trustee or Bank, as nominee for Mrs. Moss, we will expect that to be produced under the subpoena.

Mr. McKay: I will look through the file again. I am not familiar with the situation. If there is a possibility that she may have been represented by someone else maybe there is an agreement there, but I was looking for the name Moss. I do see his name on some mortgages but not on any agreement to which we are a party. I do not mean by saying that I have not been able to find it that I am going to stop looking for it.

The Court: Is there some other name like Mr. Moss?

Mr. Wright: That is a possibility.

Mr. McKay: Now that that possibility has been called to [fol. 1331] my attention I will look for it that way. Marion

D. Wood, Hippodrome Theatre, Little Falls, N. Y.; I produce a bill of sale from Marion D. Wood and Elizabeth Wood of the city of Little Falls to Schine Theatre Co., Inc., covering the equipment and personal property in the Hippodrome Theatre, Little Falls, N. Y.

The Court: For sale or lease?

Mr. McKay: A bill of sale simply of the equipment and personal property in the theatre. It is dated June 23, 1926.

Mr. Wright: I will ask to have that marked Exhibit 84 for identification.

(The bill of sale, dated June 23, 1936, between Wood and Schine Theatre Co., Inc., for Hippodrome Theatre, Little Falls, N. Y., referred to was marked as Plaintiff's Exhibit 84 for identification.)

Mr. McKay: Young & Whitney Real Estate Company, Capital Theatre, Ilion, N. Y. The subpoena calls for Young & Whitney Real Estate Co. This agreement I have is Young & Whitney, Inc. I assume they must be the same company.

Mr. Wright: We will ask to have that marked Exhibit [fol. 1332] 85 for identification.

The Court: Is this a sale or a lease?

Mr. McKay: It is the sale of a lease. I have an idea, your Honor,—I have not read the agreement very carefully, but I have some idea that there is some real estate leasing involved in it. It is an agreement dated May 27, 1937, between Young & Whitney, Inc., a New York corporation, as seller, and Perry Theatre Corporation, a New York corporation, as purchaser.

The Court: To whom?

Mr. McKay: Perry Theatre Corporation.

The Court: Is that a subsidiary?

Mr. McKay: That is a subsidiary.

The Court: That is of the Capitol Theatre where, Ilion?

Mr. McKay: Capitol Theatre, Ilion.

Mr. Wright: Mark that Exhibit 85 for identification.

(The agreement, dated May 24, 1937, between Young & Whitney and Perry Theatre Corporation, referred to, was marked as Plaintiff's Exhibit 85 for identification.)

[fol. 1333] Mr. McKay: While I think of it, your Honor, I located the exhibit that was missing yesterday, S-72, the Bieberson agreement. I was right in the assumption that had been used in the Bieberson deposition.

Mr. Wright: We will offer S-72 in evidence with the provision against competing which we are interested in which appears on the second page of the agreement. The date of S-72 is March 21, 1938.

(Thereupon the Bieberson agreement dated March 21, 1938 was marked as Plaintiff's Exhibit S-72 in evidence.)

Mr. McKay: John Buckman, Star Theatre, Delaware, Ohio. I produce an agreement dated January 15, 1938, signed by John Buckman and relating to the Star Theatre, Delaware, Ohio, with an addenda dated January 20th, 1938, also signed by John Buckman. This paper was Defendant's Exhibit 3 in the Buckman deposition. I think in this connection the Court ought to be informed that on the Buckman deposition Mr. Buckman first admitted that he signed the first part of the agreement. He then denied [fol. 1334] that he signed the second part and then denied that he signed any part of it.

Mr. Wright: It has already been identified. It doesn't need to be remarked at all.

Mr. McKay: It is called for under your subpoena.

Mr. Wright: That is right. I suppose you are producing this paper marked Defendant's Exhibit D-3.

Mr. McKay: D-3, that is D-3 on the deposition, that isn't D-3 in this case.

Mr. Wright: There is no need to remark it. We may not offer it. We probably won't.

The Court: D, did you say?

Mr. McKay: D-3. John Bahas, Ohio Theatre, Ashland. I produce a bill of sale from John Bahas to the Bell Theatre Corporation, dated July 10th, 1938, covering personal property and equipment located in the Ohio Theatre, Ashland, Ohio. I have a copy of it here so we can mark that. Then we won't have to have this one photostated.

Mr. Wright: I will ask to have that marked as No. 86 for identification.

[fol. 1335] (Thereupon the Bill of Sale from John Bahas to the Bell Theatre Corporation, dated July 10, 1938 was marked as Plaintiff's Exhibit No. 86 for identification.)

Mr. McKay: I have here the customary affidavit the seller makes under the Bulk Sales Act of Ohio. I don't presume you want that, do you?

Mr. Wright: No.

Mr. McKay: I may state to your Honor I am fairly certain there must be, in addition to that bill of sale, an assignment of lease, but I haven't as yet been able to find it. I will continue my search for it.

The Court: Was he the owner or lessee of the theatre?

Mr. McKay: He held a lease on the theatre. May we have about a five-minute recess?

The Court: We will stand in recess for five minutes.

(Short recess.)

(During the recess undescribed papers were numbered for identification by the reporter as Plaintiff's Exhibits 87 to 121, inclusive, for identification.)

(Whereupon a recess was taken until 2 P.M.)

[fol. 1336] After Recess, 2 P.M.

Appearances: Same as before noted.

Mr. McClennen: If your Honor please, during the recess the Court Reporter has marked for identification as exhibits 87 to 121 certain papers produced by us under the subpoena to plaintiff's Counsel, which I will describe as follows:

Exhibit 87, January 17, 1936, Henry Bieberson, Jr., and Belpik Theatre Corporation, as to theatres in Athens, Ohio.

Exhibit 88, January 25, 1936, Schine Chain Theatres, Inc., and Beulah M. Custer and E. R. Custer, as to theatres in Athens.

Exhibit 89, May 29, 1937, Belpik Theatre Corporation and Arthur J. Buck, Ural Buck, Eulalia Hawkins and Charles H. Mergenthaler, as to theatres in Fostoria, Ohio.

Exhibit 90, January 18, 1936, Delaware Realty Company, to Schine Delaware Corporation, assignment of lease as to Delaware, Ohio.

Exhibit 91, February 10, 1941, Henry Bieberson to Schine [fol. 1337] Delaware Corporation, a bill of sale as to Delaware, Ohio.

Exhibit 92, January 10, 1936, Henry Bieberson, Jr., and Belpik Theatre Corporation, agreement concerning Athens, Ohio.

Exhibit 93, January 18, 1936, Schine Chain Theatres, Inc., and Henry Bieberson, Jr., concerning theatre in Delaware, Ohio.

Exhibit 94, January 17, 1936, Henry Bieberson, Jr., to Schine Chain Theatres, Inc., an option for purchase concerning Delaware, Ohio.

The Court: That option related to the bill of sale, Exhibit 91, did it?

Mr. McClennen: All these Bieberson ones, I take it, did.

The Court: Exhibit 91 is a bill of sale from Bieberson and this is an option, you say. I don't know whether it relates back.

Mr. McClennen: I think that is probably a reverse of the dates, that the option was ahead of the bill of sale.

Mr. McKay: If I may explain to you, your Honor, when we made the original agreement with Mr. Bieberson we formed the corporation in which we each had 50% of the stock, and he turned over his theatre and equipment to that corpora-
[fol. 1338] tion. Then he granted us an option to buy his 50% of the stock after a period of, I think it was, two years, and that is the option that has just been offered.

The Court: You spoke of Exhibit 91 as a bill of sale?

Mr. McKay: Yes. When the corporation was formed in which he owned 50% and we owned 50% Mr. Bieberson turned over his property to that corporation and issued a bill of sale pursuant to that transaction.

The Court: I see.

Mr. McClellen: Exhibit 95, January 17, 1936, Henry Bieberson, Jr., to Schine Delaware Corporation, concerning the Strand Theatre Building in Delaware.

Exhibit 96, September 21, 1937, Hahnar D. Shreffler and Belpik Theatre Corporation as to Shelby, Ohio.

Exhibit 97, July 23, 1935, Belpik Theatre Corporation and William K. Selman, concerning Norwalk Theatre Corporation, Norwalk, Ohio.

Exhibit 98, September 29, 1938, a letter confirming agree-
[fol. 1339] ment between Chesapeake Theatres Corporation and Marsh Gollner.

Mr. Wright: May I ask whether that is produced in response to paragraph 3 or some other paragraph?

Mr. McClennen: I do not know.

Mr. McKay: It is produced in response to paragraph 4. That relates to Hurlock.

Mr. Wright: That is produced in response to paragraph 4 of our subpoena and relates to Hurlock, Maryland?

Mr. McKay: Yes.

Mr. Wright: That is what I want.

Mr. McClennen: 99, June 30th, 1939, a lease by Chester A. Lee and Ada M. Lee to Hurlock Theatre Corporation of building known as the Marada Theatre Building in the Town of Saint Michaels, Maryland.

The Court: That is number what?

Mr. McClennen: That is No. 99.

The Court: I thought you said 99 was a lease from Lee.

Mr. McClennen: That is this lease.

The Court: I thought you said that was also Hurlock, Maryland?

Mr. McClennen: It was to the Hurlock Theatre Corporation, but relates to the Marada Theatre Building in Saint [fol. 1340] Michaels, Maryland.

The Court: Maryland?

Mr. McClennen: Maryland. 100, November 17th, 1938, a letter from Chesapeake Theatre Corporation to Mary E. Waller, Roland H. Weller, Everett L. Waller, Charles Lynn Waller and Thomas J. Waller, relating to a lease of the same date which will be Exhibit No. 101.

Mr. Wright: It isn't clear to me which town 100 relates to; which part of the subpoena.

Mr. McKay: Laurel, Delaware.

Mr. McClennen: No. 101, a lease from the same named Wallers to Chesapeake Theatres Corporation, concerning Laurel, Delaware.

102, May 26th, 1938, between J. B. Russell and L. A. Russell, a lease to the Phoenix Amusement Company of property situated in Maysville, Kentucky.

103, October 26th, 1938, Milford Playhouse, Inc., an agreement to sell to Chesapeake Theatres Corporation land in Milford, Delaware.

Exhibit 104, January 12th, 1939, Milford Playhouse, Inc., to Milford Theatre Corporation, a letter concerning Plaza [fol. 1341] Theatre, Milford.

Mr. McKay: That is the same property referred to in the previous agreement.

The Court: That is the Milford, Delaware?

Mr. McKay: Yes.

Mr. McClennen: Milford, Delaware.

105, March 30th, 1938, Corning Opera House Company to Fred Gerber, a letter concerning the Palace Theatre, Corning, New York.

106, April 1st, 1938, a lease from Fred Gerber to Corning Opera House Company, property in Corning, New York.

107, January 13th, 1938, Charles O. Brown and Bessie O. Brown, a lease to Phoenix Amusement Company.

The Court: Phoenix, did you say?

Mr. McClennen: Phoenix Amusement Company, property in Middleboro, Kentucky.

108, January 13th, 1939, Charles O. Brown and Bessie O. Brown, a lease to Phoenix Amusement Company, property in Middleboro, Kentucky.

~~109, January 21st, 1938, copy of an agreement~~, Mt. Lyric [fol. 1342] Real Estate Corporation and James A. Upham, Mabelle G. Upham, Stephen P. Upham and Harriett E. Upham, property in Mt. Vernon, Ohio.

The Court: An agreement you said, or a letter?

Mr. McClennen: That was an agreement.

Mr. McKay: It is an agreement to build and lease, your Honor.

The Court: All right.

Mr. McClennen: We now come to a different class of exhibits, these are employment contracts.

Mr. Wright: If the Court please, before we proceed to those, we would like to know what the position of the defendants is as to these other items that have been specified for which nothing has been produced.

Mr. McClennen: They are still under search.

Mr. Wright: When will we know whether they are available or not?

Mr. McClennen: When we complete our search.

Mr. Wright: When do you expect to complete the search?

Mr. McClennen: As rapidly as we can.

Mr. Wright: It seems to me, if the Court please, there are some of these that haven't been produced, relating to a subpoena returnable on Monday. We asked for them on [fol. 1343] August 15th, and we ought to know whether they will be produced or are in the possession of the defendants.

Mr. McClennen: Mr. Wright, these papers came by truck loads from New York and Gloversville, and this is a holiday in which the parties are not available. Mr. McKay has gathered these as rapidly as he could. It may be we can get them tomorrow, I don't know, so that I can report to you at this particular moment.

The Court: You mean these from 110 to 121, are agreements between individuals?

Mr. McClennen: That is, these that I am coming to are agreements of employment of individuals.

Mr. Wright: I just want to make a note now of those which you say you are still searching for, as I understand it.

Mr. McClennen: We are searching for all of those in paragraph 3 of your subpoena returnable August 15th, 1944, as far as they are in existence and have not already been produced.

Mr. McKay: I will make a statement about Federalsburg; That is one of the situations in 4. I have found the folder, [fol. 1344] and the folder has the deeds of the property. That was a transaction I handled personally, and I am very strongly of the impression that there was a preliminary agreement. That agreement was not in the folder; I may have a copy of it in my office. If I have, I will bring it up on Monday. It is a transaction that I know of personally. If I am not able to bring up the agreement, I will give them the deed, but if we have the agreement, it will be a much simpler proposition, simply a transaction where three local businessmen sold us a theatre in Federalsburg, a purely real estate transaction. I can't understand why the agreement isn't in the folder, but it is not there.

Mr. McClennen: Continuing with the description of the exhibits identified——

Mr. Wright: These exhibits you are now referring to, I take it, are those produced in response to paragraph 43 of the original trial subpoena which calls for all contracts, agreements or memoranda, and other writing to which any defendant exhibitor is now a party, or to which any defend- [fol. 1345] ant exhibitor has been a party at any time since January 21st, 1931, which provides for employment by the defendant exhibitor in the capacity of manager or superintendent of said theatres or made a partnership with the former owner or principal operator of theatres acquired or which were then added to defendants' exhibitor circuit.

Mr. McClennen: I haven't examined which particular paragraph we are presenting these in respect to. We have them here. They are within some of your subpoenas.

Mr. Wright: I take it your description was they were contracts of employment.

Mr. McClennen: That is what I said.

Mr. Wright: Then I take it they are being produced in response to paragraph 43.

[fol. 1346] Mr. McClennen: Continuing with the description of the exhibits identified: Exhibit 110, September 23, 1935, between Belpik Theatre Corporation and M. H. Breyer, for employment as Resident Manager of theatres in Bucyrus, Ohio, for two years.

Mr. McKay: Your Honor may recall that Mr. Breyer testified here in the early stages of the trial.

Mr. McClennen: Exhibit 111, August 12, 1938, Chesapeake Theatre Corporation and Lee Insley, employment as Division Manager in the States of Delaware, Maryland and Virginia.

Exhibit 112, January 20, 1936, Belpik Theatre Corporation and J. C. Platt, as Manager of theatres in Mt. Vernon, Ohio.

Exhibit 113, January 11, 1939, Phoenix Maysville Theatre Company and Jack Frisch as manager of the Washington, Hollywood and Russell theatres, Maysville, Kentucky.

Exhibit 114, January 7, 1941, Schine Lexington Corporation and Leon B. Scott as manager of the Margie Grand Theatre in Harlan, Kentucky.

Exhibit 115, November 15, 1935, Schine Ashland Corporation and B. W. Bickert, employment as theatre manager at Ashland, Ohio.

[fol. 1347] Exhibit 116, February 22, 1936, Seneca Theatres in Tiffin, Ohio.

Exhibit 117, July 24, 1931, Kinney-Mott Corporation and Ed. P. Mott as resident manager of theatres in the city of Wooster, Ohio.

Exhibit 118, September 29, 1938, Chesapeake Theatres Corporation and Marsh Gollner as district manager for the Eastern shore of Maryland, the employer to have the right to change the territory.

Exhibit 119, March 30, 1938, Corning Opera House Company and Robert K. Gerbert, manager of the Palace Theatre, Corning, New York.

Exhibit 120, February 14, 1941, Schine Theatrical Company, Inc., and Michael Boumansour as manager of the Malone and Plaza Theatres, Malone, N. Y.

Exhibit 121, July 24, 1935, Norwalk Theatre Corporation and William Selman, resident manager of theatres in Norwalk, Ohio.

(The above described exhibits were marked Plaintiff's Exhibits for identification 87 to 121, inclusive.)

[fol. 1348] Mr. McClennen: That completes the exhibits that we have been able thus far to number.

Mr. Wright: If the Court please, I assumed that we were going to get today a final statement as to what the defendants did or did not have that answered the description of the subpoenaes, one of which has been served nearly two years ago, and the other returnable on the 15th. We want to know at some point when this search that apparently still continues is going to terminate, and there should be someone who could tell us the point at which they have exhausted whatever they have in their files as to each of these paragraphs. We thought that would be done in this two-day interval which was set aside for this purpose. I think we ought to know now when that will be done.

Mr. McClennen: It will be done just as fast as we can complete it. Some of these are specific descriptions and search has been made in the files where those would be, and that search is still going on for such as have not yet [fol. 1349] been located, and we will continue just as rapidly as possible.

The Court: What is your program for tomorrow? Will you have witnesses tomorrow?

Mr. Wright: Tomorrow we have scheduled the distributor representatives for the authentication of documents and contracts produced from their files, and that is to continue for the next few days.

The Court: There will not be any duplication of these already in?

Mr. Wright: No. This material we have been identifying here has all been produced from the defendants' files.

The Court: I understand that, but of course it relates to contracts with distributors, some of that material?

Mr. Wright: Yes, and much of it is inter-office memoranda which these defendants would not have in their files.

Mr. McClennen: When I said this was all that we had numbered, we have right here in the court room a lot more papers that come within these descriptions, and I had thought that the understanding was that those were going [fol. 1350] to be numbered in your Honor's absence and then could be described, and they are all ready to go forward with that now.

Mr. Wright: That is agreeable to us. Of course it is understood all these numbers here are for identification only. I don't think you stated that at the time you read it.

Mr. McClennen: I stated at the time before I began and in the course of it that it was only for identification, so that none of these papers are now in evidence.

The Court: It seems to me if you have a good many of these documents and papers to which the subpoena is directed you could go over these together and save time by doing that.

Mr. McClennen: That was the plan, if your Honor please, to go right on as we have been doing.

The Court: Can you continue that this afternoon among yourselves?

Mr. McClennen: Yes, sir. We cannot possibly get through all of them this afternoon. There are, I suppose, hundreds within this subpoena.

The Court: I thought you wanted to spend your time this [fol. 1351] afternoon seeing what you could do about it.

Mr. McClennen: They are all here produced.

The Court: We will suspend until tomorrow at 10 o'clock and in the mean time use your best efforts to get this matter together so that we can proceed rapidly tomorrow.

(Whereupon an adjournment was taken to tomorrow, Thursday, September 28, 1944, at 10 o'clock A. M.)

[fol. 1352] Mr. McClennen: After the adjournment of court, by agreement of Counsel, the following license contracts by United Artists Corporation were marked for identification:

No. 122, August 22, 1933, picture "I Knew Her When", covering 25 towns.

No. 123, August 22, 1933, "Alexander Korda Production", covering 25 towns.

No. 124, August 22, 1933, "Trouble-Shooter", covering 25 towns.

No. 125, August 22, 1933, "Missed Lonely Hearts", crossed out in pencil and over-written "Advice to Lovelorn", covering 25 towns.

No. 126, November 18, 1935, "Call of the Wild", covering 15 towns.

No. 127, November 18, 1935, "Cardinal Richelieu", covering 14 towns.

No. 128, November 18, 1935, "Dark Angel", covering 21 towns.

No. 129, "Barbary Coast", October 2, 1935, covering one town, and November 11, 1935, same picture, covering 20

towns, and attached thereto riders adding other towns.

[fol. 1353] No. 130, undated rider for attachment to contract of December 23, 1936, covering 43 towns for "Come And Get It" and "Beloved Enemy."

No. 131, undated rider for attachment to contract of December 23, 1936, "Garden of Allah", "A Star is Born", and untitled Ronald, 43 towns.

No. 132, undated rider for attachment to contract of December 23, 1936, "History Is Made At Night", and "Wuthering Heights", 43 towns.

No. 133, undated rider for attachment to contract of December 23, 1936, 43 towns, "Rembrandt, I Claudius", and "Knight Without Armor".

No. 134, undated rider for attachment to contract of December 23, 1936, "Shake Hands With Murder", and "The Woman's Touch", 43 towns.

No. 135, undated rider for attachment to contract of November 4, 1937, "Vogues of 1938", 48 towns.

No. 136, undated rider for attachment to contract of De-
[fol. 1354] cember 23, 1936, "Personal History", "Desert Intrigue", and "You Only Live Once", 43 towns.

No. 137, undated rider for attachment to contract of December 23, 1936, "Men Are Not Gods", and "Elephant Boy", 18 towns.

No. 138, undated rider for attachment to contract of March 14, 1938, "Goldwyn Follies", "The Hurricane" and "Marco Polo", 21 towns.

No. 139, undated rider for attachment to contract of March 28, 1938, "Nothing Sacred", 21 towns.

No. 140, undated rider for attachment to contract of November 4, 1937, "Stella Dallas", and "Dead End", 48 towns.

No. 141, undated rider for attachment to contract of December 1, 1938, "Cowboy and the Lady", "Last Frontier", and "Daring Age", 43 towns.

No. 142, undated rider for attachment to contract of December 1, 1938, "Drums", 44 towns.

No. 143, undated rider for attachment to contract of
[fol. 1355] December 1, 1938, "Algiers", "Stage Coach", "Trade Winds", "Winter Carnival" and "Man And His Women", 21 towns.

No. 144, rider for attachment to contract of December 1, 1938, "Man in the Iron Mask", "Kit Carson, Avenger",

"Duke of West Point", "South of Pago Pago", and "King of the Turf", 21 towns.

No. 145, undated rider for attachment to contract of December 1, 1938, "Cowboy and the Lady", "Last Frontier", "The Daring Age" and "Wuthering Heights", 22 towns.

No. 146, undated rider for attachment to contract of November 20, 1939, "My Son, My Son", "Two Years Before the Mast", "House of Monte Cristo" and "Valentino", 24 towns.

No. 147, undated rider for attachment to contract of September 22, 1939, "Four Feathers", 21 towns.

No. 148, undated rider for attachment to contract of November 29, 1939, "My Son, My Son", "Two Years Before the Mast", "House of Monte Cristo", and "Valen-
[fol. 1356] tino", 18 towns.

No. 149, undated rider for attachment to contract of November 29, 1939, "Our Town", 24 towns.

No. 150, undated rider for attachment to contract of November 29, 1939, "Our Town", and untitled Lubitsch, 18 towns.

No. 151, rider for attachment to contract of November 29, 1939, "Our Town" and untitled Lubitsch, 10 towns.

No. 152, undated rider for attachment to contract of November 29, 1939, "Our Town" and untitled Lubitsch, 13 towns.

No. 153, undated rider for attachment to contract of November 29, 1939, "My Son, My Son", "Two Years Before the Mast", "House of Monte Cristo" and "Valentino", 13 towns.

No. 154, undated rider for attachment to contract of November 29, 1939, "My Son, My Son", "Two Years Before the Mast", "House of Monte Cristo" and "Valentino", ten towns.

[fols. 1357-1360] No. 155, undated rider for attachment to contract of February 19, 1941, "The Great Dictator", seven towns.

No. 156, undated rider for attachment to contract of February 19, 1941, "The Great Dictator", six towns.

No. 157, undated rider for attachment to contract of February 19, 1941, "The Great Dictator", five towns.

No. 158, undated rider for attachment to contract of February 19, 1941, "The Great Dictator", three towns.

No. 159, several undated riders for attachment to contract of December 16, 1940, "The Westerner", four towns in the aggregate for the several riders, 69 towns.

No. 160, several riders for attachment to contract of February 19, 1941, "Cheers for Miss Bishop", towns in the aggregate of the various riders, 71

No. 161, two riders dated December 7, 1934, one for "Kid Millions" in 12 towns and one for "We Live Again" in 12 towns.

[fol. 1361] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, September 28th, 1944, at 10 A. M.

Appearances:

Robert L. Wright, Esq., John F. Glagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for Defendants.

[fol. 1362] PROCEEDINGS

(Reporter's Note: In marking exhibits previously the No. 79 was skipped through inadvertence of counsel, so that there is no Plaintiff's Exhibit No. 79.)

Mr. Wright: Shall I proceed, your Honor?

The Court: All right.

Mr. Wright: Today and tomorrow are the days we have set aside for identifying the documents which had previ-

ously been produced from the files of the distributors, and photostatic copies of which had been furnished to counsel for the other side, but the authenticity of which they have been unwilling to admit or stipulate. Our first witness will be Mr. Felix A. Jenkins. Would you please take the stand.

[fol. 1363] FELIX A. JENKINS a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Jenkins?

A. I live in Montclair, New Jersey.

Q. What is your occupation?

A. I am secretary of the 20th-Century-Fox Film Corporation.

Q. How long have you held that position?

A. Since 1934.

Q. Have you brought with you today the documents which were subpoenaed from the 20th-Century-Fox Film Corporation for production at the trial of this case which were specified in the list sent you by the Government with the letter of July 31st?

A. Yes, sir.

Q. And those documents are the group you have in your hand and they are marked for identification as Exhibits 163 through 242, inclusive?

A. Yes, sir.

Q. I believe that No. 236 is missing, is that right?

[fol. 1364] A. I am not sure of the number. One missing which you have there photostated.

Q. I will hand you this photostat of an inter-office memo dated February 13th, 1940, from Mr. William Sussman to Mr. Jack Blum and ask you if you recognize that as a photostatic copy of a document which was in the files of 20th-Century-Fox Film Corporation?

A. Well, a search of our files was made pursuant to the subpoena, and the original of this could not be found. Where this photostatic copy came from I don't know.

Q. You recall, do you not—

A. I recognize the name of William Sussman as one who did work for us and the name of Jack Blum as one who worked for us at the date of this document and still works for us.

Q. You recall, do you not, Mr. Jenkins, that at the time the subpoena was served you received a photostatic copy of everything that was furnished to the Government, all photostats that were furnished to us?

A. I believe we did.

Q. And were you able to locate your photostatic copy of that document?

A. Well, I personally did not make the search. It was made under my direction. This is what we recovered, this group of documents I hold.

[fol. 1365] Q. You were unable to locate either the original document or your photostat of the document which is marked 236 for identification?

A. That is correct.

Q. And I will hand you this memorandum from L. J.—a photostatic copy of a memorandum from I. J. Schmerz to J. Sichelman, dated September 6th, 1932, marked 162 for identification.

The Court: 162 to 242; is this mentioned?

Mr. Wright: This is——

Q. With reference to this document I have just handed you, marked 162 for identification, would your testimony be the same as with reference to the document——

A. Yes, except that I can add that the photostat includes a signature of I. J. Schmerz, which appears to be his signature with which I am familiar.

[fol. 1366] Q. Mr. Jenkins, could you tell us what position, if any, Mr. Tom H. Bailey held with the Fox Company from July, 1934, through November, 1940?

A. He was District Manager of our so-called Northeast District. He supervised the Albany, Boston and New Haven exchanges.

Q. Throughout that entire period?

A. Yes, sir.

Q. What were his duties as such Supervisor?

A. His immediate superior would be the Eastern Division Manager at the Home Office and he generally supervised the operation and the sale of pictures, licensing of pictures, through those three exchanges.

The Court: What do you mean by "supervised"?

The Witness: He supervised the licensing of them, the sale of them.

Q. Could you tell us what position Mr. John D. Clark held with your company in May, 1934?

A. He was the General Sales Manager of the Company.

Q. Can you tell us the period during which he was the General Sales Manager?

A. I cannot give you the exact date when he entered upon his duties as such. I believe it was the early winter of 1934, and he continued in that position until his death on June 1, 1938.

[fol. 1367] Q. Can you tell us what positions, if any, Mr. J. J. Grady held with your company during the period from September, 1938, through March, 1941?

A. He was our Cincinnati Exchange Manager at that time.

Q. Throughout that period?

A. Yes, sir.

Q. Can you tell us when he became your Cincinnati Exchange Manager?

A. In the season of 1933-1934.

The Court: I thought you said 1938 through 1941.

Mr. Wright: 1938 to 1941 is the particular period that is involved in these memorandums that were identified, but I thought we might as well have the full span of his term in that particular position.

Q. You say he started there in the 1933-1934 season?

A. That is right.

Q. Is he still there or when did he terminate there?

A. In September, 1942, he became a District Manager.

Q. For the Fox Company?

A. Yes, sir.

By the Court:

Q. What does an Exchange Manager do?

A. He supervises the operation and the sale of pictures from a given exchange. What we call an exchange is [fol. 1368] a local sales office, and he is the head of that particular office.

By Mr. Wright.

Q. I believe I neglected to ask you what Mr. Clark's duties were as General Sales Manager.

A. He was the executive head in charge of the sales of our pictures in the United States and Canada.

Q. Can you tell us what position Mr. E. C. Granger held with your company from July, 1934, through November, 1935?

A. He was Eastern Division Sales Manager, directly under Mr. Clark.

Q. How long did he hold that position?

A. He left the employ of the company in April, 1936, and he assumed that position some time in 1934.

Q. And what were his duties as Eastern Division Sales Manager?

A. At that time the Sales Manager had divided the country into two divisions, roughly, East and West. The Eastern Division Manager was the Supervisor of his half of the country, answering to the General Manager.

By the Court:

Q. What about the Northeastern Division?

A. Well, that is a district. This I spoke of as a division.

Q. That is the Eastern District?

A. At the bottom is the exchange. Then there is a little [fol. 1369] district, three or four exchanges, and above that comes a division, and above that the sales manager.

By Mr. Wright.

Q. Can you tell us what position Mr. M. Grassgreen held with your company from July, 1934, through December, 1941?

A. He was manager of our Albany, New York, exchange.

Q. When did he first become manager there?

A. I think I have that here (referring to paper). The season of 1934-1935.

Q. And when did he terminate in that capacity?

A. He was transferred to the managership of the Boston exchange the season of 1942-1943.

Q. What were his duties as manager of the Albany exchange?

A. Well, similar to Mr. Grady's, who managed the Cin-

cinnati exchange. He was the local resident operating head of that exchange, supervising its operation and the sale within his territory.

Q. Can you tell us what position Mr. F. B. Klein occupied in April, 1939?

A. He was a salesman in our Washington, D. C., exchange.

Q. Can you tell us what period of time he was a salesman in that exchange?

A. He has been and still holds that position ever since December 2, 1929.

Q. What were his duties as salesman?

[fol. 1370] A. A salesman has definite accounts, definite exhibitors, theatres, assigned to him. He goes out on the road and solicits the licensing of our pictures to the theatres directly.

Q. What position did Mr. George A. Roberts hold with your company in July, 1934?

A. He was the District Manager of what we call the Central District, which included Cleveland, Buffalo, and Cincinnati exchanges.

Q. How long did he hold that position?

A. Well, from March 6, 1933, to August 7, 1942.

Q. And what were his duties as such District Manager?

A. To generally supervise the three exchanges, the operations and sales of those three exchanges which I named.

The Court: Would he be under Grady?

The Witness: No, he would be under a Division Manager.

Q. Over Grady?

A. He would be over Grady. Grady was under him at that time.

By the Court:

Q. Grady was the Exchange Manager?

A. Yes.

Q. Then he would be over Grady?

A. Yes, sir.

[fol. 1371] By Mr. Wright:

Q. What position did Mr. Sidney Sampson hold with your company from December, 1932, through June, 1939?

A. Manager of our Buffalo exchange.

Q. Can you give us the total period of his employment in that capacity?

A. The season of 1932-1933, and he left to supervise our Canadian District some time in 1943.

[fol. 1372] Q. What were his duties as manager of the Buffalo Exchange?

A. To supervise the operations of the Buffalo Exchange, direct its sales, supervise the salesmen, the same as every other sales manager whom you have mentioned.

Q. What position did Mr. I. J. Schmerz have with your company from September, 1932 through September, 1939?

A. Manager of our Cleveland, Ohio, exchange.

Q. When did he begin and end that position?

A. He is still manager of the Cleveland Exchange. He became manager some time before 1932.

Q. His duties were the same as the other exchange managers you referred to?

A. Yes, sir.

Q. What position did Mr. J. Sichelman have with your company during the period from September, 1932——

The Court. How do you spell his name?

The Witness: (Spelling) S-i-c-h-e-l-m-a-n.

The Court: All right.

Q. During the year 1932?

A. During the year?

Q. Yes.

A. Mr. Sichelman was the administrative assistant to the General Sales Manager.

Q. And——

A. Generally supervises the mechanics of the others, [fol. 1373] exchange office operations.

Q. How long did he hold that position?

A. He has held it over 20 years, except for a brief period in 1934-5 when he was assistant administrative assistant to the manager in charge of foreign distribution.

Q. What position did Mr. Sussman hold?

A. Mr. Sussman?

Q. What position did Mr. Sussman hold with your company during the period from September, 1936 through March, 1941?

A. Eastern Division Sales Manager.

Q. When did he begin on that job and when did he leave?

A. From late 1933 to the spring of 1936 he was administrative assistant to Mr. Clark, the Sales Manager. In 1936 he became Eastern Division Sales Manager.

Q. How long did he continue in that position?

A. Until August of 1942.

Q. And what were his duties as Eastern Division Manager?

A. He succeeded Mr. E. C. Grainger and had the same duties that I have outlined for Mr. E. C. Grainger.

Q. What position did Mr. S. M. Wheeler hold with your company during April, 1939?

A. Manager of our Washington Exchange.

Q. How long did he hold that position?

A. From the season of 1932-33 through the season of 1941-42.

[fol. 1374] Q. And his duties were the same as the other exchange managers you have referred to?

A. Yes, sir.

Q. Mr. C. A. Hill held what position in February, 1941?

A. He was assistant to the Eastern Sales Manager.

The Court: Assistant to whom?

The Witness: The Eastern Division Sales Manager.

Q. During what period did he hold that position?

A. Since the winter of 1934, I believe I am correct in that, and he still holds it.

Q. What position did Mr. Jack Blum hold during the period from October, 1938 through January, 1941?

A. He was the head clerk in the New York home office in charge of what we called the Contract Department. It is a clerical and administrative position.

Q. He held that position during what period?

A. I can't give you that exactly, Mr. Wright, but he had been second in charge of that for some years and then was promoted four or five years ago.

Q. And he still holds——

A. No, he holds another position now. He was recently apponited assistant to the Central Division Sales Manager.

Q. Can you tell us what Mr. Blum's duties were as administrative assistant to the Sales Manager?

The Court: What is that?

[fol. 1375] Mr. McClennen: I thought he said head clerk.

Mr. Wright: Will you read what the record says?

(Preceding answer read, as follows: "A. He was the head clerk at the New York Home office in charge of what we called the Contract Department. It is a clerical and administrative position.")

By Mr. Wright.

Q. The last question should read, can you tell us what his duties were as head clerk?

A. He was responsible for the proper filing of all contracts. He made or caused to be made from those records such sales charts as the sales manager might require. It is a valuable department for the purpose of information to those in charge of sales, historical information.

Q. Mr. Herman Wobber was General Sales Manager, was he not, from June 6th, 1938 to January 1, 1942?

The Court: What is that name?

Mr. Wright: Herman Wobber.

Mr. Rogers: What was that last date, Mr. Wright?

Mr. Wright: June 6th, 1938 to January 1, 1942.

The Witness: To be more accurate, say until March, 1942, I think.

Q. And Mr. Thomas J. Connors.

[fol. 1376] The Court: He was what?

The Witness: He was General Sales Manager.

Q. And I believe you have already described the duties of the General Sales Manager?

A. Yes, sir, he succeeded Mr. John G. Clark.

Q. And had the same duties?

A. Same duties and authority.

Q. Mr. Thomas J. Connors was Assistant to the President and Vice President in charge of sales from December 8th, 1941—or, I beg your pardon—strike that out. Mr. Thomas J. Connors was Assistant to the President from the period December 8th, 1941, to April 9th, 1942?

A. I would say December 15th is your starting date, and I can't give you the exact date when he ceased.

Q. Approximately April, 1942?

A. March or April.

Q. What were his duties as Assistant to the President?

A. Actually Mr. Wobber had given up active supervision of general sales and while Mr. Connors, for those months,

held the title of "Assistant to the President", he was performing the duties of General Sales Manager.

Q. Since April, 1942, he has been Vice-President in charge of sales?

A. Yes, sir.

Q. And his duties as such were what?

[fol. 1377] A. He supervised and then he acted as General Sales Manager in charge of all sales in the United States and Canada and in addition generally supervised foreign sales.

Q. And Mr. William J. Krupper was executive assistant to Mr. Connors from May 25th, 1942, to August 2nd, 1943, was he not?

A. Yes, sir.

Q. What were his duties as such executive assistant?

A. Prior to that he had been Western Division Sales Manager and while he was Executive Assistant to Mr. Connors, well, he generally just took as much of the burden off Mr. Connors as he could. That is about the way I can say it.

Q. Since August 2nd, 1943, he has been the General Sales Manager?

A. Yes, sir.

Q. With the same duties that you have already described for the other sales managers?

A. Yes, sir.

Mr. Wright: That is all the testimony we will offer from Mr. Jenkins with respect to these documents that have been marked for identification. We may recall him for the identification of some license contracts.

[fol. 1378] Cross-examination.

By Mr. McClennen:

Q. Mr. Jenkins, what is the body or person in the Fox organization that determines the general sales policy for the year?

A. The General Sales Manager under our present setup, it would be a combination of Mr. Connors and Mr. Krupper.

[fol. 1379] Q. And has that situation been true for, say, the last dozen years?

A. Yes, sir. Of course you understand that the General Sales Manager confers with the President of the company on things as important as that.

Q. Who determines when the season's sales efforts shall begin?

A. The General Sales Manager.

Q. Does he have the final say-so if he chooses to take it, without submission to those above him?

A. Well, I know of no written constitution in our company that lays down those duties exactly. I know that the Sales Manager is generally left alone to lay down policies, but of course he confers with the President, whoever is his immediate boss. They are in constant touch with each other.

Q. Is he provided by someone else with features that are in contemplation to be sold during that season?

A. Do you mean is he provided with information about them?

Q. In framing his sales policy is he told by someone else what he has to sell?

A. Yes. The Sales Manager and the President are in constant touch with the studio and are aware at all times of the studio plans, what pictures are projected to be made, what are in actual work, and generally know pretty ac- [fol. 1380] curately what the pictures will be some six months ahead. Not as long as that nowadays, but two or three months ahead.

Q. Who then determines the general plan of placing for those pictures?

A. Generally it would be by the Sales Manager, but any extraordinary picture or pictures that we consider very extraordinary and very valuable, and perhaps very expensive, the sales policy generally would be fixed in consultation between the Sales Manager, the President, the head of the studio, and perhaps it would not been fixed until a picture had been tried out in certain spots and certain types of handling.

Q. The price of a picture to a given theatre that you seek to get varies very generally among the theatres, does it not?

A. Yes, sir, widespread.

Mr. Wright: If the Court please, I think this is considerably beyond the scope of the direct examination. It has nothing to do with the authentication of these documents. That is all that we put Mr. Jenkins on the sand for. I think if he has some facts that he wants to develop as part of his [fol. 1381] case the proper time to develop them would be when he puts on his case.

The Court: He testified on the question of the authority of these officers.

Mr. Wright: We have not attempted to make any showing as to any authority. We have merely pointed out who these men were and what they did. Here he is not talking about authority. He is discussing the general proposition of how pictures are priced. That, it seems to me, is not related to the direct examination.

The Court: You inquired specifically as to the duties of certain of these officers.

(Last question and answer read.)

Mr. Wright: I do not see what that has to do with authority or duty.

The Court: Overruled.

By Mr. McClennen:

Q. What is the body or individual or individuals that determine the price that should be sought for that picture from the different theatres?

A. The sales manager.

Q. Does he furnish to the division manager a program of those prices to be sought or is it determined by him from time to time with respect to the particular theatres?

[fol. 1382] A. They are determined from time to time for each picture, or possibly a group of pictures, and it would be more accurate to say that terms are the policy of the terms to be sought, rather than pricing; because of the many pictures that are sold on a percentage basis there is no fixed dollar price.

Q. As to the percentage pitcures, does the company in its policy seek to get the same percentage for a specific picture from all theatres?

Mr. Wright: If the Court please, I do not think that this witness is competent to testify as to that fact. He does not make the sales policy. I do not see what relevance it has, in any event.

The Court: I think he would be competent to testify, but it is a question whether we should limit these things now at this time. As I pointed out, if he intends to call this witness later, as I understood——

Mr. Wright: Only for the purpose of identifying licensing contracts.

The Court: What is your theory of its competency, Mr. McClennen? Is it not more properly a part of your case?

Mr. McClennen: No, I am seeking to show what is in-
[fol. 1383] herent in the description which the witness has given of the men in these different positions, to show what is the scope of their duties in determining what shall be done in the sale of pictures. That is the very thing that the witness was called to testify to, the scope of these duties.

Mr. Wright: Read the last question.

(Last question read.)

Mr. Wright: In other words, he is asking the Secretary of the Company now to tell what the Company's sales policy is, without any preliminary foundation at all that he knows or is in a position to know what the sales policy was at any particular time.

The Court: He can inquire, if he knows. He has stated here about the policies in certain respects and he may inquire whether he knew what the policy was in regard to the fixation of price.

By Mr. McClennen:

Q. Do you know the policy of the company, in answer to the unanswered question which I just put to you?

A. In my work there it is necessary for me to be generally familiar with our sales operations.

[fol. 1384] Q. Who determines the percentage that is to be charged for picture X to the different theatres in the country?

A. That would usually be determined——

The Court: What?

The Witness: It would be usually determined after a conference between the Sales Manager and his three immediate assistants, the division managers. When I say Sales Manager I would say the Vice President, Mr. Conners and Mr. Kupper, and the three division managers, they would thresh out their policy and it would come as a directive from the Sales Manager.

Q. Then is the Company's effort to get that percentage according to the general layout of policy the same with respect to all theatres?

Mr. Wright: If the Court please, that is a question that I do not think even the Sales Manager himself could answer.

What the Company does it apparent, and actually what all of these men who make up the sales organization have done. No witness here can undertake to say what was done, how these pictures were actually sold. That only appears from the testimony of these people—or could only be made to [fol. 1385] appear from the testimony of the people who carried on the negotiations.

The Court: He, in his position as Secretary, knowing, as he says, what the policy is, would know what the contract generally provided.

Mr. Wright: That, as I understand it, is not the question that was asked him.

(Question read.)

By Mr. McClennen:

Q. Perhaps, to put that more specifically, picture A you have determined should be a 30% picture. Is that determination, in so far as your effort is concerned, uniform for theatres, large, small, city, country, and what not?

Mr. Wright: I submit, your Honor, that that question could only be determined by an examination of the contracts that are taken for large theatres and small theatres. That will show whether they are uniform percentages.

The Court: I think he may state generally what the policy is. He is not inquiring about a specific contract. Can you state that that was the policy to vary the percentage according to location of theatres? That is the point of the question as I understand it.

[fol. 1386] Mr. Wright: The question suggested, as I understood it, that there was no variation.

The Court: State what the fact is.

Mr. Wright: Read the question again.

(Question read.)

A. Generally, no.

By Mr. McClennen:

Q. That is, the percentage that you shall seek from different theatres varies?

A. That 30% picture is usually for first run, perhaps a second run, determined according to the size of the theatre, the size of the town. That picture finally gets down into

small towns, small theatres, where we may never have a picture on percentage.

The Court: That does not quite clear it up. Are you speaking now about specifically as to first run pictures that the percentage is different or do you mean by your answer that first run pictures always carry the same percentage?

The Witness: I mean if we have fixed on a period at 30% we would seek that 30% from every first run. We would not get it at all times.

The Court: That is your asking price?

The Witness: Yes, sir, that is the policy that we are going [fol. 1387] to endeavor to sell that picture on.

By Mr. McClennen:

Q. When you come to the flat rental pictures what body or individual or number of individuals determine what rental you shall seek to get from the different theatres in the country to which you hope to sell that picture?

Mr. Wright: If the Court please, I submit that is a question Mr. Jenkins clearly is not competent to answer.

The Court: What they seek to get——

Mr. Wright: I must say that I do not understand the relevancy of it, in any event. If Counsel has something that he wants to develop as part of his own case I do not think this is the place to develop it because we have got a situation here where we have seven of these witnesses who are attempting to authenticate this material in two days' time here. I do not see how it can be done if Counsel is to be permitted to go off into his own theory of the case with each of these witnesses at this point, just as a matter of convenience. The only purpose these people were brought here for, and we set aside these two days, was in order to [fol. 1388] authenticate documents. This other material that Mr. McClennen is developing is very interesting, but I do not really see the occasion for developing it at this time.

Mr. McClennen: This witness has been put on to show to some extent the scope of the duties of different individuals. I am now endeavoring to show the scope of those duties and nothing else.

Mr. Wright: To what purpose? What possible difference does it make in the case whether Mr. Jenkins says, "We tried to get a particular percentage from everybody," or

"We tried to get different percentages"? I do not see what possible relevance it has to any issue we are trying.

Mr. McClennen: It makes a great deal of difference in the case who determines the price that shall be attempted to be gotten.

Mr. Wright: As to who determines it, that has already been fully covered.

Mr. McClennen: I think not. Will you read the question?

(Last question read.)

A. Flat rentals are usually—the majority of flat rental contracts would be in respect to small theatres, and the [fol. 1389] local exchange manager, along with his district manager and his salesmen, confer together and determine if they should endeavor to get so many dollars for such-and-such a picture from such-and-such a house. When they finally agree with the exhibitor on what the exhibitor is willing to pay, that contract is sent up for approval. It may not be approved when it reaches the home office.

[fol. 1390] Q. In the determination by the local manager of what he shall seek to get from a particular theatre, does he submit that in advance to headquarters as the proposed price?

A. Headquarters or sales managers or division managers or district managers are in constant touch with the local offices; they travel around; they are conferring about the sales situation in each district in certain theatres from week to week, day to day, and month to month.

Q. And is the plan of operation that the branch manager tells the salesmen what to try to get from theatres, after he has taken the matter up with the district manager or the division manager?

A. He may or may not have taken it up in advance.

Q. That is, he may have decided what he thinks would be a proper figure to ask?

A. Yes.

Q. And he tells the salesman what he ought to get?

A. Yes, sir.

Q. You spoke about the salesmen being sent to designated theatres to solicit their business; who determines what theatres salesman X shall call upon?

A. The exchange territory is divided into salesmen's territories. As to who determines what salesman is going

to take a certain sales territory I think I will have to say [fol. 1391] I don't know. I can give you a good guess.

Q. According to the setup plan somebody tells the salesmen that he ought to drum on theatre X and others, by name, and he — sent out for that purpose?

A. Yes, sir.

Q. The contract—the first step in an actual contract is an application for a contract which is signed by the exhibitor?

A. Yes, sir.

Q. And that is transmitted to the branch office?

A. Yes, sir.

Q. And transmitted by the branch office to the home office?

A. If the exchange manager approves the terms offered, he forwards it to his district manager and the district manager approves it, it goes to the home office for the division manager's final approval. If the division manager has any doubt, he goes to his sales manager.

The Court: You say it finally goes to the district manager?

The Witness: No, it goes from the exchange to the district manager; from the district manager to the division manager.

The Court: That is the line?

The Witness: Yes, sir.

By Mr. McClennen:

[fol. 1392] Q. And the contract, no one has the right to approve the contract except the home office?

A. That is correct.

Q. In the case of the large buyers, and let me interrupt, we both understand the same, that when I speak of buying and selling, I am referring only to efforts to get contracts for licenses and the making of those contracts?

A. Yes, we license our pictures under copyright, but in speaking of those transactions we refer to them as buying and selling.

Q. Now, in the case of the large prospective buyers, particularly the circuit buyers, that have to buy for a large number of different theatres, are the transactions mainly conducted by the superior people, such as the sales manager or division manager?

A. The division and district manager, we work very closely together on the large transactions.

Q. And in that case the branch officers are from time to time advised of what circuit or large contracts for theatres in their area have been consummated or are in negotiation at the home office?

A. They would have full knowledge of negotiations going on. Their practical knowledge of the situation necessitates the district and division manager to consult with the exchange manager. They are all working together.

[fol. 1393] Q. Now, is there any one who is authorized in the field, either salesman, branch manager, or otherwise, to make any transactions which would conflict with the negotiations going on for these larger contracts?

Mr. Wright: If the Court please, that is objected, not only on the ground Mr. Jenkins is not competent to answer it, but it calls for a pure conclusion of this witness that isn't based on any ascertainable facts, whether or not conflicts occurred is something that would have to be developed by evidence.

The Court: Sustained.

Q. Are the branch managers given instructions from time to time as to not proceeding with negotiations that might conflict with large contracts that are under way at the home office?

The Court: He said they all went together, they are all informed of what is being done, the branch manager as well as others.

The Witness: I don't understand the question.

The Court: I thought you had already in fact answered it. Repeat the question.

(Last question read.)

The Witness: I don't think I can answer that, Mr. McClennen, other than to say that our branch managers are [fol. 1394] consulted with constantly, and repeat what I said before, our district managers and our division managers travel and the whole sales force for each territory knows what is going on.

Q. Who has the duty of determining finally whether a given theatre shall not be solicited at all for contract in a given season?

A. Any determination not to sell a given theatre so far as I know would come from the home office.

Q. Who determines whether or not to sell second run or other deferred run in a locality, who makes the final determination on that?

A. The division manager.

Q. The branch officers have to do, not merely with sales but also with booking arrangements with the particular theatres in their respective branch and the furnishing of films under the contracts that have been made to those theatres?

A. Yes, they——

The Court: Now, you have got the furnishing of the film.

The Witness: The delivery at a proper date of prints of a picture and the dates they have agreed on, the exchange operation naturally includes all the acts that have to be done on the distributor's part to carry out the contract [fol. 1395] he had previously made.

By Mr. McClennen:

Q. Now, that is under the general supervision of the branch manager, is it?

A. Yes, sir.

Q. And that is what you refer to when you say he has general supervision?

A. Of exchange operations, yes, sir.

The Court: Mr. Wright.

Redirect examination.

By Mr. Wright:

Q. You didn't mean to suggest by your last aswer, did you, Mr. Jenkins, that the branch manager didn't have supervision over the sales operations in his territory?

Mr. McClennen: That form I object to, if your Honor please.

Mr. Wright: I simply want the situation clarified.

The Court: He can state whatever duties he had.

Mr. Wright: I thought that Mr. McClennen sought by the last question to imply all a branch manager did was to supervise furnishing prints. Maybe I misunderstood the question and answer.

The Court: Did you mean to say those were all the duties [fol. 1396] of the branch manager?

The Witness: No, sir.

By Mr. Wright:

Q. And when you said that nobody could approve a contract except the home office, you didn't mean, did you, that the contract might not be signed by some other representative?

A. No.

Q. That is the——

A. The exchange manager recommends the contract to the district manager; the district manager recommends the signing or entering into the contract to the division manager, and the division manager then decides finally "We will accept that application".

Q. I understand the decision is made, but I say, you are aware of the fact, are you not, that in such instances the home office people may have delegated the authority to sign to some other representative, isn't that correct?

A. Why, it could happen.

Q. The mere fact that a contract was signed, let us say, on behalf of the Company, by a branch manager, would not necessarily indicate at all it wasn't authorized, isn't that a fact?

A. It wouldn't necessarily indicate that, that is right.

Q. And you, yourself, I take it, have nothing to do with [fol. 1397] the licensing of pictures as such, or determination of sales policies, is that right?

A. That is right, I have nothing to do with it.

Q. Except in so far as law violations might be involved?

A. Well, in my work as home office lawyer I necessarily have to familiarize myself with the operations of the sales department.

Recross-examination.

By Mr. McClennen:

Q. I thought that you had fully described the branch office work with reference to sales; when you speak of supervision, apart from this office supervision that you have described, and the contact with the sales effort which you have described, is there anything else that you know of that comes within the supervisory duties of the branch manager?

A. Well, he keeps careful watch on whether the salesmen are selling their pictures to all their possible accounts and

various—we have what we call possibilities, a number of theatres that we should sell to, for which the salesmen are immediately responsible and the exchange manager is watching him and watching his whole exchange operation, whether they are keeping up; also, when the application comes in he has to determine whether he will recommend [fol. 1398] that to his district manager, or whether he will send his salesman back and try to get better terms.

Q. Have you now stated all the features of supervision that there are within your knowledge?

A. Well, exchange operations include the solicitation of exhibitors, the license agreements for our pictures, which include when a contract has been made the carrying out of that contract which involves booking, dating, the delivery of the print at the proper time, the collection of the film rental, and all those involve various operations and accounting, and so forth, of which he is — general charge.

Q. At times the final signature on the exhibitor's copy of the contract is affixed by the branch manager, is it?

A. Not that I have ever seen, Mr. McClennen.

Q. That is, the signing is all done at headquarters?

A. We take the signed contract, which is an application from the exhibitor; the signing on our part is done at the home office.

Q. So that no contract goes into effect until there has been affixed some signature at the home office?

A. It could happen; I don't know what has happened; it could happen that somebody signed on our behalf, but he would not have authority to do so unless he did receive it as an exceptional case, such as was suggested by Mr. [fol. 1399] Wright.

Redirect examination.

By Mr. Wright:

Q. What I had in mind specifically, Mr. Jenkins, were some agreements offered in evidence where, or on which the signature of the branch manager appears on behalf of the company, you do not have any knowledge as to whether or not those men were authorized to sign those agreements?

Mr. Rogers: Pardon me, Mr. Wright, I don't think there are any contracts offered in evidence which bore the branch manager's signature.

Mr. Wright: I am quite sure there are.

Mr. Rogers: Not in Fox. I would like you to produce one so we can see it, and until it is produced I don't think the witness should be called upon to answer a question. My position is there are no such contracts and Mr. Wright's position is that he has been shown or has contracts showing the signature of the branch manager of 20th-Century-Fox.

The Court: If there are none, what harm is there?

The Witness: I have the general knowledge——

The Court: Read the question.

[fol. 1400] (Last question read.)

The Court: Do you know of any such contracts that were signed?

The Witness: I know of no such contracts.

By Mr. Wright:

Q. As far as you know, however, there is nothing in the Company's policy which would prevent the division manager or general sales manager from designating a branch manager or any other representative of the company to sign a contract on behalf of the company, isn't that right?

Mr. McClennen: That is objected to as not proper redirect examination and not proper in form to his own witness.

The Court: It will let him state what the policy was in that respect.

The Witness: I can't undertake to tell you what some division manager has done in the past or will do in the future.

The Court: I don't think the question was that.

Mr. Wright: That is what I wanted to establish.

The Court: Whether it is the policy of the Company?

Mr. Wright: Repeat the question, please.

(Question read.)

[fol. 1401] The Witness: Our general fixed policy is that no one has the right to sign licensed agreements on our behalf except the division manager or general manager.

[fol. 1402] Q. You do not know whether there have been exceptions to that with respect to policy or not?

A. If the general manager has made exceptions to it I wouldn't know.

Mr. Wright: We have a list of the documents, with numbers. I think the description with the numbers should appear on the record at this time for your Honor's convenience, although we are not offering any of them in evidence. I suppose we might as well simply have the reporter copy the descriptions of the documents and then your Honor can read the transcript, unless you would prefer to have the descriptions read off here in your Honor's presence. I think the other system would take up time.

The Court: Take the most expeditious way. We will take a five-minute recess.

(Short recess.)

Mr. Wright: If the Court please, with reference to the matter of having the transcript show a description of each of these documents that were identified, Mr. McClennen said [fol. 1403] he did not desire any such description in the transcript, and we supplied him with a copy of our list, so unless your Honor desires to have individual descriptions of them incorporated in the transcript we will omit that.

The Court: Very well.

(Various papers and documents were marked as Plaintiff's Exhibits 162 to 242 for identification, inclusive.)

Richard P. Morgan, a witness called by and on behalf of the Plaintiff and having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Morgan?

A. Deal, New Jersey.

Q. What is your occupation?

A. I am Counsel for Paramount Pictures, Inc.

Q. How long have you held that position?

[fol. 1404] A. Four and a half years.

Q. You are the representative who has been designated by Paramount to appear here and identify the documents listed in our letter of July 31st to you?

A. That is correct.

Q. Have you produced, in response to the subpoena served upon Paramount Pictures, Inc., the documents that have been marked for identification as 243 to 259, inclusive?

A. I have.

Q. And those are the documents you have in your hand there?

A. That is right.

Q. Can you tell us what position Mr. Neil Agnew held with the Paramount Company in the year 1939?

A. He was Vice President and General Sales Manager.

Q. Do you know the approximate period he held that position?

A. He became General Sales Manager in 1934 and held the position until the early spring of 1944.

Q. And what were his duties in that connection?

Mr. McClennen: Just a moment. In view of the remarks made on the cross-examination of the last witness, I make the objection that it does not appear that this witness is qualified to state the duties. I make it so that it may be determined whether or not he is, so that my cross-examina-
[fol. 1405] tion may proceed accordingly.

The Court: Perhaps you had better inquire as to his knowledge of the conduct of the business.

By Mr. Wright:

Q. Mr. Morgan, in response to an inquiry from the Government, did you undertake to determine the employment of Mr. Agnew and his duties during that employment with Paramount, for the purpose of supplying that information here?

A. I did.

Q. And you have been able to determine that information?

A. Yes, sir.

Q. Will you tell us what Mr. Agnew's duties were?

Mr. McClennen: That is apparently having an investigation made in order that the witness should draw a conclusion as to what those duties were, a long period before he was with the Company. I have no objection to this as an easy means of this question being determined, provided I am not going to be met with an objection on cross examination when I seek to make clear the scope of those duties, and that is as far as my objection goes.

The Court: I have already held with you on your position [fol. 1406] in that respect.

Mr. McClennen: Yes, but this new question.

The Court: I doubt, as far as appears now, whether the witness would be competent to testify to this inquiry. It would probably be hearsay, but it would necessitate bringing other officials of the Company here.

Mr. McClennen: All I had in mind is that your Honor make a ruling admitting this testimony that is broad enough so that I may cross-examine to the same extent the direct examination presents.

The Court: I am not going to advise Counsel for the Government.

Mr. Wright: As I understand it, Mr. Agnew's duties as Sales Manager are not something which is in controversy between us at all. This is purely formal proof and I don't have any objection to Mr. McClennen developing, through this witness, what the scope of those duties were, but if his objection is that this witness is not competent to testify at all as to what Mr. Agnew's duties were, then I suppose the Company would have to furnish someone else, in so [fol. 1407] far as the prior period is concerned.

The Court: I think your statement meets Mr. McClennen's purpose.

Mr. McClennen: I think it does. It is a convenient way of proving these things, if we could have the same scope that we would have if the witnesses themselves were called.

The Court: Go ahead, Mr. Wright.

By Mr. Wright:

Q. You may tell us now what Mr. Agnew's duties were.

A. The General Sales Manager is in charge of the distribution of the pictures produced by Paramount throughout the United States and Canada.

The Court: Let me ask you one question. In your duties as Counsel are you engaged in the office all the time?

The Witness: Yes, sir, I am employed by Paramount.

The Court: Your sole duties are in the Home Office of Paramount?

The Witness: Yes, sir.

The Court: And you are in contact with all work of the office?

The Witness: Yes, sir.

The Court: I did not know whether you were acting just as Special Counsel or whether you were there all the time. [fol. 1408] The Witness: No, sir, I am employed there full time.

The Court: That clarifies it.

A. He has general supervision over the sales force, composed of the divisional sales manager, the district manager, the branch managers, and the salesmen. He is the final word in the approval or rejection of any contracts. However, from time to time, by action of the Board of Directors, such authority is delegated to the divisional sales managers.

[fol. 1409] By Mr. Wright:

Q. Can you tell us what position G. S. Beattie occupied with Paramount in May, 1937?

A. In May of 1937, G. S. Beattie was the booking manager of the Buffalo Exchange.

Q. Do you know approximately how long he held that position?

A. I do not.

Q. And what duties did he perform as booking manager?

A. The booking manager of an exchange has general supervision over the liquidation of the license agreements entered into between Paramount and the exhibitors in the Buffalo territory. He accepts and his assistants the date for the exhibition of the pictures, sends out to the exhibitor a confirmation of the play date, sees that the picture is shipped and returned to the exchange on time.

Q. Do you know whether Mr. Beattie also held that position in March, 1938? Those are the two dates involved in the documents here?

A. Yes, sir he did.

Q. And what position did Mr. Duke Clark hold?

The Court: What period?

By Mr. Wright:

Q. Clark, during the years 1938-39?

A. He was Branch Manager of the Paramount Exchange [fol. 1410] in Cleveland.

Q. Do you know what his term of office there was?

A. No, I don't, Mr. Wright. Have you that list there (referring to document)?

Q. Maybe this will help you refresh your recollection.

A. Mr. Clark was Branch Manager of the Cleveland Exchange from May 9, 1938 to June 29th, 1940, when he was transferred to California.

Q. What were his duties?

A. The branch manager has——

Mr. McClennen: Now, if your Honor please, I make the same formal objection and, if I may have the same assurance from Mr. Wright as to all these others, as in the case of Mr. Agnew, that takes care of the objection.

The Court: I don't think there should be an additional objection under the statement of counsel here that later on he will strike out unless that testimony is received.

Mr. McClennen: I think I didn't make clear my statement. I wanted to put the witness' testimony with respect to all of these subordinates on the same basis as the Agnew.

The Court: My point is I did not see the necessity of rais-[fol. 1411] ing an objection in view of the statement of counsel.

Mr. McClennen: If it is understood that Mr. Wright's statement extends to these others as well as Mr. Agnew, it is covered.

By Mr. Wright:

Q. Have you answered the question?

Mr. Rogers: We haven't a statement from Mr. Wright as to whether or not it does.

Mr. McClennen: I understand the Court to say Mr. Wright's statement does cover it.

Mr. Rogers: Very good. I did not so understand.

The Witness: The duties of a branch manager are as follows: He has general supervision over the personnel employed in the particular exchange of which he is branch manager. He further has the supervision over the liquidation of contracts in that territory, general supervision of the salesmen who negotiate the license agreements with the exhibitors in that territory, and he sometimes negotiates contracts with the more important accounts in the territory itself; I should say, solicits license applications from the more important exhibitors within the territory.

[fol. 1412] By Mr. Wright:

Q. What position did P. E. DeGrau occupy with the Paramount Company in the years 1938-39?

A. Miss DeGrau, for at least 15 years prior to this fall, has been the head clerk in charge of the contract approval department in the home office.

Q. What were her duties as such?

A. She had under her supervision a staff of clerks whose duty it was, when a contract was received in the home office from one of the exchanges, to analyze the terms of the contract, that is, the rental terms, and to prepare for the use of the division sales manager, in determining whether to approve or reject the contract, a chart showing the past performance, that is, the rentals received in the past from a particular account which was attached then to the license application and forwarded to the division sales manager's office.

Q. What position did Mr. C. G. Eastman hold with Paramount for the period from May, 1934 through February, 1940?

A. He is Branch Manager of Paramount's Albany Exchange.

Q. Do you know what the total period of his tenure there is?

A. He became Branch Manager on March 28th, 1932, and he still holds that position.

Q. His duties were the same with reference to that exchange as Mr. Clark's with respect to Cleveland?

[fol. 1413] A. That is right.

Q. What position did Mr. Harry Goldstein hold with Paramount in August, 1938?

A. Mr. Goldstein was the District Manager in Cleveland, having supervision over the Cleveland, Cincinnati and Detroit Exchanges.

Q. Do you know during what period he held that position?

A. I don't have those dates here, Mr. Wright.

Q. Now, can you tell us what his duties were as District Manager?

A. The District Sales Manager is in charge of the several exchanges located within his territory, and he confers with the branch managers in those exchanges as to the liquidation of contracts and the solicitation of license applications. He transmits to the branch managers the sales policies as devolved by the officials of the company and generally supervises the personnel in the exchanges in accordance with the recommendation of the branch managers.

Q. What position did Mr. M. S. Kusell hold with Paramount during the period from or during the year 1934?

A. Mr. Kusell, for a great many years past, has been the district manager of the territory embraced by the Buffalo, Albany and New York Exchanges. At the present time neither Albany nor Buffalo are included in that dis- [fol. 1414] trict. He is now district manager of the New York Exchange only.

Q. They were included in the territory during 1934?

A. That is correct.

Q. And what were his duties as District Manager, were they the same with respect to that district as those of Mr. Goldstein with respect to his district?

A. That is correct.

Q. And what position did J. Oulhan hold with Paramount in 1937?

The Court: How do you spell it?

Mr. Wright: Oulhan.

The Witness: Mr. Oulhan is and has been since December 3rd, 1934, the Branch Manager of the Cincinnati Exchange.

Q. And his duties were the same with respect to that exchange as Mr. Clark's with respect to Cleveland?

A. That is correct.

Q. What position did Mr. Kenneth Robinson hold with Paramount during the year 1934?

The Court: The name again?

Mr. Wright: Kenneth Robinson.

The Witness: Mr. Robinson was the branch manager for the Buffalo Exchange at that time.

Q. And do you know what the period of his tenure was? [fol. 1415] A. He became Branch Manager of the Buffalo Exchange on May 2nd, 1932 and held that position until August 15th, 1942, when he was transferred to Boston.

Q. And his duties as manager of that exchange were the same as those of Mr. Clark with respect to Cleveland Exchange?

A. Yes, sir.

Q. What position did Mr. George J. Shaeffer hold with Paramount in the year 1934?

A. He was General Sales Manager of Paramount, Mr. Agnew's predecessor.

Q. He was Sales Manager, was he not, from January, 1932 through December, 1935?

A. That is approximately the period of time, yes, sir.

Q. And his duties as Sales Manager, during that period, were the same as described for Mr. Agnew?

A. Yes, except Mr. Shaeffer never had the title of Vice President.

Q. His title was only General Sales Manager?

A. That is right.

Q. What position did Mr. J. J. Unger hold with Paramount from June 1st, 1933 through November, 1936?

A. He was Eastern Division Sales Manager.

Q. Do you know how long he held that position? I believe it was from approximately January, 1932 until Au-
[fol. 1416] gust, 1942, was it not?

A. That is approximately correct.

Q. What were his duties as Eastern Division Sales Manager?

A. The Divisional Sales Manager works directly under the General Sales Manager and has supervision over the districts and the branch offices located within his division. He has delegated to him, by the General Sales Manager, the power to reject or approve license applications. He confers with the General Sales Manager on matters of policy and communicates the decisions made thereon to the District and Branch Managers and he generally supervises the so-called selling and liquidation of contracts throughout his division.

Q. Can you tell us what branches were included within the Eastern Division Sales Manager's jurisdiction?

A. Well, again, without enumerating them, I can say that at that time we had only two divisions, the Western Division and the Eastern Division, and roughly speaking all of the exchanges from Detroit east were located within the Eastern Division, and on the other side of Detroit those exchanges were located in the so-called Western Division.

Q. Mr. C. M. Reagan was Assistant General Sales Manager from March 3rd, 1941 to April 14th, 1944, was he not?

A. That is correct.

[fol. 1417] Q. And what were his duties?

A. Well, he was Executive Assistant of the General Sales Manager, and his duties were similar to those of the General Sales Manager, and the Divisional Sales Managers. He in general supervised the more important negotiations

throughout the country, taking the detail load off the General Sales Manager's shoulders, so to speak.

Q. And Mr. Unger was succeeded as Eastern Division Sales Manager by Mr. Hugh Owens, was he not?

A. That is correct.

Q. And held that position until June, 1944?

A. That is correct.

Q. His duties were the same as those of Mr. Unger?

A. Yes.

Mr. Wright: I think that is all.

Cross-examination.

By Mr. McClennen:

Q. Mr. Morgan, you have not only been counsel in the headquarters of Paramount, for Paramount, for some four years, but also have had a good deal of familiarity with the affairs of Paramount besides that matter of being counsel?

A. Yes, I have been employed by Paramount for approxi-
[fol. 1418] mately 12 years.

Q. And had a certain inheritance; your father was what?

A. He was formerly Divisional Sales Manager.

Q. And what you have described here is as accurate a description as you are able to make from both that contact and the investigation that you have made?

A. Yes, sir.

The Court: That is all. I think we will suspend now. I have an appointment and we will adjourn until 2 o'clock.

(Whereupon certain documents and papers relating to Paramount were marked as Plaintiff's Exhibits for identification No. 243, and from 245 to 279, inclusive, for identification.)

(Whereupon, a recess was taken until 2 o'clock P. M.)

[fol. 1419] After Recess, 2 P. M.

Appearances: Same as before noted.

STEPHEN W. MCGRATH, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. McGrath?

A. 11453 175th Place, St. Albans, New York.

Q. What is your occupation?

A. I am Assistant Contract Manager of the United Artists Corporation.

Q. How long have you held that position?

A. About eleven years.

Q. What are your duties as Assistant Contract Manager?

A. To assist in the physical handling of contracts, exhibition contracts, that are sent to the Home Office by our various exchanges throughout the country and, in addition, to supervise the contract department.

Q. You have been designated by the United Artists Corporation to produce the documents here which were subpoenaed from the corporation for the trial of this case?

A. I have.

[fol. 1420] Q. And did you bring with you the documents which have been marked as Exhibits 280 to 323 for identification, inclusively?

A. I did.

Q. And will you hand those to the reporter, please?

A. Yes, sir (handing to reporter).

(The various papers and documents referred to were marked as Plaintiff's Exhibits 280 to 323, inclusive, for identification.)

Q. In the course of your employment by United Artists have you had occasion to become familiar with the positions held by the Home Office executives and the branch managers?

A. Yes, sir, I have.

Q. Can you tell us what position Nat Beirr held in 1936 with the United Artists Corporation?

A. Well, at that time he was operating out of the New York office as a salesman—I should say the New York exchange—and also acted in the capacity of Assistant Sales Manager.

Q. Assistant to whom? Who was then the Sales Manager?

A. Assistant to Clarence Eiseman, I believe it was, or I believe at that time Moe Streimer.

Q. What were his duties during that period?

A. Of course, as a salesman he solicited theatres that [fol. 1421] were considered in his block and as assistant branch manager he assisted in the duties at the exchange in connection with local New York deals.

Q. What position did J. A. Bykowski hold with United Artists Corporation during the period from April, 1937, to March, 1939?

A. Office Manager of the Buffalo exchange.

Q. Do you know the limits of the period during which he held that office?

A. Yes, I believe from about 1931 to date.

Q. And what are his duties as Office Manager?

A. As Office Manager he supervises the operation of the exchange in connection with the various people that are employed and also acts in the capacity as a booker.

Q. Could you tell the Court what a booker does?

A. Yes, a booker—well, to use the expression, "books pictures", with the various theatres that we do business with. In other words, get together with the exhibitors for arrangement of play dates for the play-off of pictures.

Q. What position did C. Eiseman hold with your company during the period from 1932 to 1940?

A. Well, during that period he was employed by the Company in other exchanges than New York. I don't know the period that he acted in the capacity as our Atlanta branch [fol. 1422] manager, but I know that he came from Atlanta to New York and then acted in the capacity as the branch manager at New York during the period October, 1938, to August of 1942, and as of that date he resigned from the company.

Q. What were his duties as branch manager?

A. As branch manager, supervision of the exchange and responsible for the sale of the pictures in the territory controlled by the New York exchange.

Q. Wasn't he at one period connected with the Washington exchange, calling your attention to 1940?

A. I don't recall him being affiliated with the Washington exchange.

Q. What area was served out of the New York United Artists exchange?

A. The lower part of the State of New York and the northern part of the State of New Jersey.

Q. Did you have an exchange at Albany during this period?

A. No, sir.

Q. The area that was covered from Albany by other companies was covered from New York City by your company?

A. Yes, sir.

Q. What position did Harry L. Gold hold with the United Artists from August, 1933, through June, 1937?

A. He has held the position of Eastern Division Manager.

[fol. 1423] Q. Do you know the limits of the period that he held that office?

A. Well, I would say some time prior to 1931, or further back than there. I think he has been with the company almost since its inception, although I am not sure of that, but he is still employed in the same capacity at the present time.

Q. What are his duties as Eastern Division Sales Manager?

A. As Eastern Division Sales Manager he is responsible for the various exchanges referred to as the Eastern Division. In other words, he is responsible for the sale of the product in these various exchanges that he controls.

Q. Can you, roughly, bound the area over which he has jurisdiction?

A. At one time it was east and west of the Mississippi, the Eastern Division east of the Mississippi, but they have made changes from time to time and what the dates of these changes are, or the additional exchanges that might be added I don't remember.

Q. It has always included, has it not, the exchanges at Cleveland and Cincinnati and east of those points?

A. That is correct.

[fol. 1424] Q. What position did Mr. A. A. Goodman hold with your company during the period for the years 1936 and 1937?

A. At that time he was manager of the Cleveland Exchange.

Q. That was for what total period?

A. He acted in the capacity as Manager from January of 1932 to September, 1941.

Q. And what were his duties as such manager during that period?

A. As manager of the Exchange, supervision of the operation of the Exchange and the sale of the pictures in the territory controlled by that branch.

Q. What position did Mr. J. H. Kaplan hold with United Artists during the year 1933 through 1935?

The Court: Kaplan, did you say?

Mr. Wright: (Spelling) K-a-p-l-a-n.

The Witness: Branch Manager of the Buffalo Exchange.

Q. He became Branch Manager there in 1929?

A. That is correct.

Q. And continued in that capacity until 1936?

A. Correct.

Q. His duties as Branch Manager were the same with reference to the Buffalo Exchange as those of Mr. Goodman with respect to Cleveland?

A. That is correct.

Q. And what position did Mr. S. B. Kramer have with United Artists?

[fol. 1425] A. He was the Manager of the Cincinnati Exchange.

Q. During what period?

A. During the period of February, 1933 through December of 1933.

Q. What position did he hold in 1934?

A. I think that he went back as a salesman. It seems that in the operation of that Cincinnati office that at one time Mr. Stahl was manager, and I don't know whether it was due to illness or not that Mr. Kramer more or less acted as substitute, so to speak, during the time that he was the Branch Manager of the Cincinnati Exchange.

Q. During the time that Mr. Kramer was Branch Manager there, his duties were the same with respect to that Exchange, his duties were the same as Mr. Goodman's at Cleveland?

A. That is correct.

Q. What position does Mr. P. M. Lazarus hold with the Company?

A. Mr. P. M. Lazarus is contract manager.

Q. How long has he held that position?

A. If I am correct in the inception of the company, I think it was about 1919, or thereabouts.

Q. What are his duties as contract manager?

A. He is in charge of handling, physical handling of contracts that are submitted to the home office by our various exchanges for disposition.

[fol. 1426] Q. What position did Mr. Sid Lehman hold with the United Artists during the years 1939 and '40?

A. He was Branch Manager of the Buffalo office.

Q. Do you know the total period of his managership?

A. From January of 1937 to April of 1943.

Q. And during that period his duties were the same with respect to the Buffalo Exchange as Mr. Goodman's in respect to Cleveland?

A. Correct.

Q. What position did Mr. Edward Mullins hold with your company during the years 1939 and '40?

A. Office Manager of the New York Exchange.

Q. Do you know of the total period he held that office?

A. Well, he is employed with the Company today in the New York Exchange and has been with them since some time prior to 1931.

Q. What were his duties as office manager?

A. His duties as office manager was the supervision of the employees of the exchange and in addition would lend a hand at times to booking.

Q. Mr. Paul D. O'Brien, I believe is not an employee of your corporation?

A. That is correct.

Q. He is a lawyer who represented the corporation as counsel?

[fol. 1427] A. That is correct.

Q. Can you give us the general overall period during which he has been acting as counsel?

Mr. McClennen: Do you mean by that from time to time as employed, or in a general employment? Will you make it clear which?

The Witness: Will you repeat the question, please?

By Mr. Wright:

Q. Maybe you can answer both.

(Preceding question and statements by Mr. McClennen read.)

A. Well, I don't recall the dates as to the period of time. I know it was a number of years.

Q. Calling your attention specifically to the year 1935?

A. At that time he was.

Q. What position *does* Mr. Samuel Resnick hold with the United Artists Corporation during the year 1936?

A. He acted in the capacity of the Manager of the Buffalo office.

Q. Do you know what period?

A. During the period June, 1936 through January of 1937.

Q. And during that time he had the same duties as the other exchange managers you have referred to?

A. That is correct.

Q. What position did Mr. L. J. Schlaifer hold in 1936?

[fol. 1428] A. During that period he acted as Division Manager for the Buffalo, Boston and New York Exchanges.

Q. Where were his headquarters?

A. His headquarters were in New York.

Q. And what were his duties?

A. Well, he had the supervision of those three exchanges and was responsible for the sale of our pictures in the territory covered by those exchanges.

Q. Do you know the total period of time during which he held that position?

A. I don't know exactly, but it was during 1936 and '37.

Q. What position did Mr. A. W. Smith, Jr., hold with your corporation during the period or during the years 1937 and '38?

A. General Sales Manager.

Q. How long did he hold that position?

A. Well, between 1935 and December, 1938.

Q. What were his duties as such General Sales Manager?

A. As General Sales Manager he was responsible for the sale of our pictures throughout the entire country.

Q. What position did Mr. Max Stahl hold with your company during the years 1937 and 1938?

A. He was Manager of the Cincinnati Exchange.

Q. Can you give us the exact period of his managership there?

[fol. 1429] A. August, 1932 through January of 1939.

Q. And his duties during that period were the same as those of other exchange managers you have described?

A. That is correct.

Q. What position did Mr. Bert M. Stearn have with your company during the years 1937, '38 and '39?

A. At that time he was our Division Manager for Cincinnati, Cleveland, Indianapolis and Pittsburgh Exchanges.

[fol. 1430] Q. And where was his headquarters?

A. Well, he had headquarters in a few places, I remember, but generally his headquarters was in Cleveland. I mean he may come to New York.

Q. Can you give us the total period that he held that position as Division Manager?

A. I have not definite dates, but I would say for five or six years prior to 1942.

Q. What were his duties as such Division Manager?

A. He was responsible for the sale of our pictures in the territories covered by those exchanges.

Q. What position did Mr. Charles Stern hold during the period from July, 1934, to December, 1939?

A. I am not sure of the dates of Mr. Charles Stern. He held two or three positions with the Company. At one time he was Supervisor for Buffalo, Boston, New Haven and the New York exchanges.

Q. Can you give us the approximate dates when he did that?

A. I don't know the approximate dates. I would be in a position to get the information.

Q. You can supply that? You will probably be recalled here to identify some contracts. Perhaps you can give it to us then. I would like to have the periods during which he held that position you have just described. What were [fol. 1431] his duties in that position?

A. Well, in the capacity of being Supervisor for the Buffalo, Boston, New Haven and New York exchanges he was responsible for the sale of our pictures in the territories covered by those exchanges.

Q. What position did Frances Turner hold with your company during 1939?

A. She acted in the capacity of secretary to Mr. Bert M. Stearn.

Q. Did she have any special duties in that connection, other than the ordinary secretarial duties?

A. Her duties were the ordinary secretarial duties.

Q. Is Mr. Matt V. Sullivan now in your employ?

A. Yes, he is.

Q. In what capacity?

A. He is now Manager for the Buffalo exchange.

Q. How long has he held that position?

A. From April of 1943 to date.

Q. What was his position prior to April, 1943?

A. Salesman for the Buffalo exchange.

Q. And his duties during the period he was Manager are those of the other exchange managers you have described?

A. That is correct.

Q. What were his duties as a salesman in that exchange?

A. He was responsible for the sale of pictures at one [fol. 1432] time in the Syracuse area and later on he got what was known as the Buffalo territory.

Q. When was it that he first became a salesman for that exchange?

A. He was appointed a salesman in September of 1932.

Q. Was that Buffalo?

A. That is correct.

Mr. Wright: That is all.

Cross-examination.

By Mr. McClennen:

Q. When you use the term "responsible for the sale" you mean, do you not, that it was his duty to get, through subordinates, the procurement of contracts in the territory as fully as it was felt was possible for submission to the home office?

A. You are referring to branch managers.

Q. Well, I was referring to the man who was responsible for the sale as you used it. Is that correct?

A. That is correct.

Q. You have used the term "Division Manager" of several territories and I think have not used the term "District Manager." Do you have a term "District Manager" in your set-up?

A. District Manager is the proper term.

[fol. 1433] Q. But in your records you call it Division, do you, rather than District?

A. Well, not necessarily. I mean the proper term is "District Manager".

Q. You used the term for the New York exchange as for the lower New York and northern New Jersey territory. Could you tell us what the upper division line of the New York territory was? How much do you take into the New York exchange?

A. I wouldn't know off-hand the division, no, sir.

Q. Did the Albany exchange range under the New York exchange or the Boston exchange?

A. New York.

Q. Could you carry the line at all to the west to tell us how far the New York exchange went?

A. I don't believe I could.

Q. Outside of New York City and, say, Westchester County, and the line up the Hudson there, can you fix any boundary to the New York exchange territory?

A. I would say Hudson, New York.

Q. You spoke of Mr. Bykowski as Office Manager of the Buffalo exchange. Is that, as the term is used, a clerical control term? Let me distinguish. What did he have, if anything, to do with the salesmen working out of that exchange?

[fol. 1434] A. I don't believe he has had anything direct to do with the salesmen.

Q. By that token he has nothing to do with the selling policy or the carrying out of that policy?

A. No, sir.

Q. Did he have anything to do with supervising the booking of the pictures after they had been sold?

A. Yes, sir, he did.

Q. And a responsibility, directly or through subordinates, to see that the prints went to the theatres to which they had been sold?

A. That is right.

Q. Did he have to do with the supervision of seeing that the prints were inspected when they came back before they went out to the next theatre?

A. That I couldn't answer.

Q. When you come to the Eastern Division Manager, saying that he was responsible for the exchanges in the Eastern Division, that was to see that they got busy on trying to

promote the sales of the pictures and to seeing that the proper prices were being obtained and the proper theatres sold?

A. That is correct.

Q. The selling of the United Artists pictures is of pictures which they do not produce; is that correct?

[fol. 1435] A. That is correct.

Q. That is, they sell pictures that are produced by a goodly number of independent producers from time to time?

A. That is correct.

Q. And under the sales set-up the contracts or the applications for contract after they are obtained in the field and have passed a recommendation of the local branch office come in to the New York office and, before final approval, the approval of the producer is obtained?

A. That is correct.

Q. You spoke of, for example, Mr. Goodman as having supervision of the operation of the exchange in Cleveland; that included the sending out of salesmen to designated theatres to solicit business?

A. That is correct.

Q. And it included the receiving of the applications brought in by those salesmen or any that came directly into the office and if they were recommended, forwarding them to the home office for approval?

A. That is correct.

Q. It included the mechanical operation of the office in the supervision of the employment of stenographers and sales force and others in the office?

A. That is correct.

[fol. 1436] Q. And have I now included all that the supervision covered? If I haven't, why, add any specific thing.

A. I believe you have covered it.

Q. The law firm of O'Brien, Driscoll & Raftery have been, at least, from time to time for a good many years, the counsel for United Artists?

A. That is correct.

Q. And Paul D. O'Brien has been either an employee or otherwise connected with that law firm?

A. That is correct.

Q. Did he ever practice law before he went into that firm?

A. That question I could not answer.

Q. Do you bear in mind approximately when he went into the employ of that firm?

A. Oh, I think some 15 years ago.

Q. Say 1929?

A. About that time.

Q. From the law school, do you know, directly there?

A. I believe so.

Q. And he was the son of what O'Brien?

A. Dennis O'Brien.

Q. Who was the senior member of that firm?

A. That is correct.

Q. When you used the term that Paul O'Brien was counsel, you meant nothing more than this, that he, as a partner [fol. 1437] of that office, acted for United Artists?

A. From time to time.

Q. From time to time. I directed your attention to the term, the use of the term "Supervisor", particularly to the one branch office; the same would apply to all other branch offices, would it?

A. That is correct.

Mr. McClennen: That is all.

Mr. Wright: If the Court please, if we could have a short recess now, to line up some additional material.

The Court: All right, if you can get it in condition.

Mr. Wright: Yes.

The Court: Call me when you are ready.

Mr. McClennen: If your Honor please, while there is an interruption, there is a thing that concerns some of my associates, and that is as to Mondays. That is, when they should get their reservations back to get here on Monday, and we express no preference, but do desire to have your Honor's determination of what your convenience is about Mondays, whether to sit at all, or to sit half a day or what the story will be.

The Court: Well, it is not material to me, we can go on [fol. 1438] in the afternoon, if you can get here in time for that and get ready for trial.

Mr. Wright: We have notified witnesses to be here Monday. I don't suppose it makes any difference. Your Honor has motion call in the morning, do you not?

The Court: Yes. 2 o'clock.

Mr. Wright: Two o'clock would be the earliest for Monday?

The Court: Yes, and we will see about it, at least for this Monday, we will understand we are going on at 2 o'clock on Monday.

We will stand in recess, and you will notify me when you are ready.

(Short recess.)

(During the recess folders containing various contracts and other documents were marked as Plaintiff's Exhibits 324 to 337, inclusive, for identification.)

[fol. 1439] FELIX A. JENKINS, recalled by and on behalf of the plaintiff, having been previously sworn, was examined and testified as follows:

By Mr. Wright: If the Court please, we have recalled Mr. Jenkins for the purpose of having him identify the license agreements which were produced by the 20th-Fox Film Company pursuant to subpoena served upon it.

Direct examination.

By Mr. Wright:

Q. Mr. Jenkins, can you produce there the document which you have furnished in response to paragraph 2 of the subpoena returnable May 19th, 1944, which calls for all license agreements for the exhibition in the following towns of feature pictures released during the period indicated: Norwich, New York, motion picture seasons 1931-1932 to 1937-1938, inclusive; Amsterdam, New York, 1931-1932 to 1936-1937, inclusive; Massena, New York, 1931-1932 to 1934-1935, inclusive; Little Falls, New York, 1931-1932 to 1935-1936, inclusive; Norwalk, Ohio, January 1st, 1934 to May 1st, 1937; Tiffin, Ohio, January 1st, 1936 to March 1st, 1938; Mount Vernon, Ohio, August 1st, 1934 to January 1st, 1941; [fol. 1440] Corbin, Kentucky, August 1st, 1938 to May 1st, 1940; Paris, Kentucky, June 1st, 1937 to June 1st, 1940; Van Wert, Ohio, January 1st, 1934 to December 1st, 1935; and Bucyrus, Ohio, January 1st, 1934 to January 1st, 1937?

A. Yes, sir pursuant to paragraph 2 of the subpoena, we have produced the contracts in this folder marked Exhibit No. 324 for identification.

Mr. McClennen: Now, you are simply identifying these?

Mr. Wright: That is right, merely for identification.

Q. And have you there the agreement produced in response to paragraph 3 of the same subpoena which calls for all license agreements entered into between January 1st, 1932 and September 5th, 1937, which provides for the exhibition of feature pictures in the Strand Theatre, Seneca Falls, New York?

A. Yes, sir, pursuant to paragraph 3 of the subpoena we have produced contracts contained in the folder marked Exhibit No. 325 for identification.

Q. And have you there the folder containing the agreements produced in response to paragraph 4 of that subpoena which calls for all license agreements entered into between June 1st, 1931 and May 1st, 1939, which provide for the exhibition of feature pictures in the Fox, State, Plaza, or Palace Theatre, Corning, New York?

[fol. 1441] A. Yes, sir, pursuant to paragraph 4 of the subpoena, we produced the contracts contained in folder marked as Exhibit No. 386 for identification.

Q. And have you there the contract produced pursuant to paragraph 5, calling for all license agreements entered into between January 1, 1932 and January 1, 1940, which provide for the second-run exhibition of feature pictures in Auburn, New York?

A. Yes, sir, pursuant to paragraph five of the subpoena we produce documents contained in folder marked Exhibit No. 327 for identification.

Q. And do you have there the documents described in paragraph six, "All license agreements entered into between January 1, 1932 and January 1, 1939, which provide for second-run exhibition of feature pictures in the Olympic, Strand, Liberty, Victoria or Palace Theatres, Watertown, New York?"

A. Yes, sir, we produce pursuant to paragraph six of the subpoena the agreements contained in the folder marked Exhibit No. 328 for identification.

Q. And do you have all license agreements entered into between June 1st, 1934 and July 1st, 1938, which provide for the second-run or subsequent run exhibition of feature pictures in Ashland, Ohio?

A. Yes, pursuant to paragraph 7 of the subpoena we [fol. 1442] produce the contracts contained in folder marked Exhibit No. 329 for identification.

Q. Have you there all license agreements entered into between January 1, 1936 and January 1, 1939, which provide for the second-run or subsequent exhibition of feature pictures in Van Wert, Ohio?

A. Yes, sir, pursuant to paragraph 8 of the subpoena we produce contracts contained in folder marked Exhibit No. 330 for identification.

Q. And do you have there all license agreements entered into between January 1st, 1935 and March 1st, 1938, which provide for the exhibition of feature pictures in the Star Theatre, Delaware, Ohio?

A. No, we have no such contracts in our file.

Q. And do you have there all license agreements entered into between June 1st, 1936 and October 1st, 1939, which provide for the exhibition of feature pictures in the Opera House, Lexington, Kentucky?

A. Yes, sir, pursuant to paragraph 10, we produce these contracts contained in folder marked Exhibit No. 331 for identification.

Q. And do you have all license agreements entered into between August 1, 1937 and August 1, 1938, which provide for the second-run or subsequent run exhibition of feature pictures in Corbin, Kentucky?

[fol. 1443] A. No, we have no such contracts.

Q. And do you have all license agreements entered into between June 1st, 1938 and January 1st, 1942, which provide for the second-run or subsequent run exhibition of feature pictures in Harlan, Kentucky?

A. No, sir, we found no such contracts.

Q. Do you have with you the following documents described in paragraph 19 of this subpoena, all license agreements entered into between January 1, 1931, and June 1, 1936, which provide for the second-run exhibition of feature pictures in Lockport, New York?

A. Yes, sir, pursuant to paragraph 19 of the subpoena I produce contracts contained in folder marked Exhibit No. 332 for identification.

Q. And do you have all license agreements for the exhibition of motion pictures in the following towns entered into during the period indicated with respect to each town: Cumberland, Maryland, 1935-1936 through 1943-44; St. Michaels, Maryland, 1935-36 through 1940-41; Easton, Maryland, 1934-35 through 1940-41; Federalsburg, Maryland, 1934-35 through 1940-41; Hurlock, Maryland, 1934-35

through 1940-41; Salisbury, Maryland, 1934-35 through 1940-41; Paris, Kentucky, 1935-36 through 1938-39; Pikeville, Kentucky, 1935-36 through 1943-44; Lexington, Kentucky, 1935-36 through 1943-44; Corbin, Kentucky, 1935-36 [fol. 1444] through 1943-44; Middlesboro, Kentucky, 1935-36 through 1940-41; Harlan, Kentucky, 1935-36 through 1940-41; and Maysville, Kentucky, 1933-34 through 1940-41?

A. Yes, sir, pursuant to paragraph 20 of the subpoena we produce the contracts contained in folder marked Exhibit No. 333 for identification.

Q. And do you have with you agreements produced in response to paragraph 1 of the subpoena of June 3rd, 1944, which calls for all license agreements for motion pictures entered into between January 1, 1935 and December 1, 1940, with Ralph T. Kemper, Halmer B. Schniffler, Tom Gregory, Louise Stoll (Mrs. Francis D. Reeh), Belpik Theatre Corporation, Schine Shelby Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Castamba, State and Opera House Theatres in Shelby, Ohio?

A. Yes, sir, pursuant to paragraph 1 of the subpoena dated June 3rd, 1944, we produce contracts contained in folder marked Exhibit 334 for identification.

The Court: Those all refer to Shelby?

Mr. Wright: All refer to Shelby, Ohio.

Q. Have you there all license agreements for motion [fol. 1445] pictures entered into between January 1, 1933 and September 1, 1938, with Arthur J. Buck, Ural Buck, C. Kahn, Ted Vermos, Belpik Theatre Corporation, Civic Theatres, Inc., Fostoria Theatres Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Civic, Roxy, State and Colonial Theatres in Fostoria, Ohio?

A. Yes, sir, pursuant to paragraph 2 of the subpoena dated June 3rd, 1944, we produce the contracts contained in a folder marked Exhibit No. 335 for identification.

Q. Do you have there all license agreements for motion pictures entered into between January 1, 1936 and September 1, 1940, with P. E. Essick, Myer Fine, Medina Temple Theatre Company, Medina-Princess Corporation, Medina Amusement Co., Schine-Medina Corporation, Schine Chain

Theatres, Inc., Schine Enterprises Corporation, Schine Circuit and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Medina Temple and Princess Theatres at Medina, Ohio?

A. Off the record, the exhibitor in these contracts is not the same as you name there, but they are all for Medina, Ohio.

Q. The contracts that you have there you say include some name you know you dealt with?

[fol. 1446] A. Yes, sir.

Q. Those are all contained in this folder?

A. Pursuant to your subpoena we have produced—pursuant to paragraph 3 of the subpoena of June 3rd, 1944, we have produced the contracts in folder marked Exhibit No. 336 for identification.

Q. Now, have you produced anything in response to paragraph 1 of the subpoena returnable August 15th, 1944, which calls for all franchises and master agreements made between you and the Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises, Schine Lexington Corporation, Belpik Theatres, Inc., or Chesapeake Theatres Corporation, for the exhibition of feature films released by you during one or more of the motion picture seasons, 1931-32 to 1940-41, inclusive?

A. Those are all the contracts I have produced.

Q. I understand you have no other contracts answering that description other than those already produced and identified?

A. That is correct, yes. We have heretofore produced all the documents we have, called for by paragraph 1 of that subpoena.

Q. And calling your attention to paragraph 3 of the same subpoena, have you there the printed schedules of feature [fol. 1447] motion picture films released by you during the period from August 1, 1931 to September 1, 1941?

A. Yes, sir, for the three seasons, 1933-1934, 1934-35, and 1935-36, I produce an office form which we call E-46, which lists all the pictures released by 20th-Fox Film Corporation, then known as Fox Film Corporation during those respective years and those pictures were released approximately in the order in which they are listed thereon.

The Court: You mean released to exhibition?

The Witness: Put out for general sale and exhibition.

The Court: To all of them?

The Witness: Yes, through all the seasons, it is a list of all pictures.

The Court: That is numbered what?

The Witness: Contained in folder marked Exhibit No. 337 for identification.

In addition, for the succeeding seasons named by you we produce a printed schedule of all pictures released by us during those respective seasons; there are release dates in the order in which they were released.

Q. I think you haven't produced there a schedule for the 1931-32 season, have you?

[fol. 1448] A. No, it is not here.

Q. Do you have one available?

A. If there is, I will look again. If it isn't here, I imagine we haven't got it.

Q. In paragraph 4 of this same subpoena, it calls for original letter from Myer Schine to J. Sichelman, 20th-Century-Fox Film Corporation, New York, New York, dated between October 21 and October 25, 1932, outlining the rental situation at Bellefontaine, Ohio, and referred to in a letter signed by the said J. Sichelman, dated October 25th, 1932, addressed to I. J. Schmertz, Cleveland, Ohio, Branch Manager of the said 20th-Century-Fox Film Corporation, Cleveland, Ohio, and transmitting a copy of said letter from Myer Schine?

A. We found no letter answering exactly to that description, but we did find and produce a copy of a letter dated—I want to correct myself—a document which purports to be a copy of a letter on the letterhead of Schine Enterprises, Inc., Gloversville, New York, dated October 24th, 1932, addressed to Mr. Jack Sichelman, Fox Film Corporation, signed by Schine Enterprises, Inc., by G. V. Lynch and mentioning Bellefontaine.

Mr. Wright: I will ask to have this letter marked as Exhibit No. 338 for identification.

[fol. 1449] (Thereupon letter dated October 24th, 1932, addressed to Mr. Jack Sichelman, Fox Film Corporation, signed by Schine Enterprises, Inc., by G. V. Lynch, referred to was marked as Plaintiff's Exhibit No. 338 for identification.)

Q. You were unable to locate in your files the original of this Exhibit No. 338 for identification?

A. We were unable to locate the original of this paper.

Q. All your search revealed was this copy?

A. That is correct.

Mr. Wright: I think that is all from Mr. Jenkins.

[fol. 1450] Cross-examination.

By Mr. McClennen:

Q. Do these folders, Mr. Jenkins, that you have produced include any contracts for shorts?

A. I believe they do.

Q. And, by that token, the effort has been to have them include all the contracts for shorts?

A. Yes, all contracts.

Q. And the same is true with respect to News, they include all the contracts for News?

A. Yes. I would like to look at those again and check, but I am quite sure they do.

Mr. Wright: We had only subpoenaed the feature contracts. If the others were included they apparently were included inadvertently.

The Witness: Yes, here is short subjects (referring to folder). Off-hand, I am not sure whether there are News in here or not, whether we included the News, but I believe we did. There are contracts for shorts included here—short subjects.

Mr. Rogers: Does that hold in every instance that wherever you had a contract for shorts it is included, or is it that there are just some shorts that happened to be stapled to a feature contract, and that where we find that to be so [fol. 1451] that merely happened inadvertently?

The Witness: I am informed we included the shorts or the News only in those cases where in our files they were stapled together. I myself did not pull them out.

By Mr. Wright.

Q. The occasion, then, for including such shorts and news reel contracts that you have in there was not in an effort to comply with the subpoena, but merely that they happened to be attached to the feature contracts?

A. So I am informed and believe.

By Mr. McClennen:

Q. These folders do not include all the contracts for shorts within the descriptions given?

Mr. Wright: The descriptions in the subpoena only call for feature pictures.

Mr. McClennen: I want to find out from the witness what they do include and what they don't. It does not make very much difference to me which, but I want him to answer.

Mr. Wright: As I understand his testimony he says he does not know. All he knows is that where the shorts are stapled in feature contracts they are there.

The Court: Are the contracts for shorts other than those [fol. 1452] shown in this exhibit——

The Witness: They were on it.

By Mr. McClennen:

Q. Were there other news contracts that are not included here?

A. Yes, sir.

Q. So these folders include the pictures that were spot booked without formal contract?

A. I can't answer that of my own knowledge. I would say probably not. Many times you do not have contracts for spot booking.

Q. Do these folders contain anything indicative of how many of these contracts remained in force, how many were modified and how many were cancelled?

A. No, sir.

Q. Do these folders contain anything indicative of the number of pictures actually taken up by the exhibitor under these contracts?

A. Do you mean the record of performance under the contract?

Q. Any way in which from these folders you could tell whether the exhibitor did play the pictures covered by the contracts?

A. No, sir.

Q. Do these folders contain anything from which we can tell whether the picture by name described in the contract [fol. 1453] was actually produced and released in that season, or the time when it was released?

A. As to those contracts which do mention a specific picture, the contract alone would not tell you that.

Mr. Wright: I take it, if I may interrupt, that that information would appear from the release schedules which you produced, would it not?

The Witness: Yes.

Mr. McClennen: Would it not be better if I completed this part of the examination?

Mr. Wright: Go ahead.

By Mr. McClennen:

Q. The release schedules that you have produced, are they the schedules of the prospective releases coming out at the beginning of the year, or are they the final schedules of the pictures that were actually released in that season?

A. The release schedules which we have produced here today are the schedules of the pictures actually released during those respective seasons.

Q. I notice that this release schedule, final No. 1, a printed schedule with red ink 1936-'37 on it, dated February 5th, saying, "Please destroy previous issues", and in parenthesis the words "Subject to change", that was not a schedule of actual releases, was it?

[fol. 1454] A. No, because it is dated February 5th, which is in mid-season. We frequently get out schedules showing what has actually been released and what we expect to release or what has actually been released only to that date. What I have given you, what I have produced here, were schedules of releases at the end of the season.

Q. Isn't this schedule one that you have produced—wasn't this right in the folder?

A. Well, then, I will pick out your final schedules, if they have got a mid-way schedule in there.

Q. This schedule called Final No. 1 of February 5th, which would mean February 5, 1937, has something cut off from the top. What was on the schedule before the excision?

A. Off-hand I don't know. It does not appear to me that anything was cut off. They have mended that tear there.

Q. You don't think that that had a heading on it that has been cut off?

A. It appears that it might have been.

Q. In this same group is one that is marked "Release Schedule, Final No.—", with the red ink on it 1936-'37, saying "Subject to change July 7, 1937", in which the

small "r" of Release and the "S" of schedule are not complete. Didn't that have some kind of a heading on it?

[fol. 1455] A. I would suppose so. It appears so.

Q. You could readily get hold, couldn't you, or have your office get hold, of what those tops were, so that we could know whether the document in other respects purported to be actual releases or only proposed releases so far as the future after the date was concerned?

A. Yes, I am sure we have in our files the copies of these schedules without anything cut off.

Q. Here is one that has no heading whatever and an obvious excision at the top (indicating), and with the red ink 1938-1939. There would be no way in which you could tell whether that was a final schedule or a proposed one, just like this Final No. 1 that we have just been speaking of, is there?

A. I can tell by the names of the pictures. May I say something off the record?

Q. Well, say it right on the record. We just want to get this question right.

A. These printed release schedules unfortunately were not brought here and we wanted to meet the subpoena and we have gotten these today from our local Buffalo exchange. That is probably where these excisions come from, for some convenient reason of his own. They have not come from our home office, because of an unfortunate omission.

[fol. 1456] Q. In this whole handful that I show you, with no tops and the dates, it is pretty obvious that none of those is a final schedule which we could surely count on as showing the pictures that were actually released?

A. This one dated April 5, 1940, shows release from August 4, 1939, through January 26th. That would be a schedule of actual releases.

Q. To that date?

A. Yes, sir.

Q. And does not contain even prospective releases on April 5, 1940?

A. No.

Q. In this same schedule of pictures released there are these sheets (indicating). This was a recapitulation of a national contract with somebody and you picked it out simply as a convenient list of the pictures of that season?

A. Yes, sir, this morning.

Q. And as the print was originally made out—this, by the way, is for which season, can you tell?

A. Yes, sir, that is for the season of 1933-1934.

Q. By the way, this will be a convenient time—this has printed on it "Group K-1, 1933-'34". We can always tell by reference to that what season a "K" series is, can we? [fol. 1457] A. Yes, sir. It would be a shorter way of saying the season years.

Q. As a matter of fact, it was taken—the "K" season was the first full season after Mr. Kent came to the Fox Company?

A. No, sir, it was the first season that we started to sell our pictures the way Mr. Kent thought they ought to be sold.

Q. Didn't he get to thinking that right away?

A. He came there in the spring of 1932 and that was, you see, for the 1933-1934 season.

Q. He came in in the spring of 1932?

A. Yes, his first season was the 1932-1933. Starting with 1933-1934 a K-1 will identify your seasons right through a K-10.

Q. By that token K-10 would be 1943-1944?

A. It would be 1942-1943.

Q. And the 11th had it existed would be adding the No. 10?

A. Yes, sir.

Q. That print for the 1933-1934 season, this particular edition came out on April 6, 1934?

A. Yes, sir.

Q. And the print was intended to be what you then expected by picture name to release in that season?

[fol. 1458] A. What we had in hand that we knew we were going to release.

Q. Then for some reason a number 439, you didn't release that one, and put in a typewritten name in its place?

A. Yes, it might even have been a change of name on the same picture.

Q. After this schedule had been printed you put on some more names in typewriting, of later numbers of which you didn't actually have the names at the time this one was printed?

A. That is correct.

Q. And that same sort of a description that you have just been giving in these questions would apply correspondingly to the K-2 series and the K-3 series?

A. Yes, sir.

Mr. Wright: If the Court please, I was just going to remark that there is not any occasion, as far as we are concerned, for any prolonged examination on these release schedules. If there are more accurate schedules than these he has produced, we of course want them, and I suppose he is willing to supply them and send them to Counsel for the defendant and a copy to us, and we can then substitute [fol. 1459] those schedules for these if they are more accurate.

The Witness: I will get them out on Monday and mail them.

Mr. McClennen: I have to make the record clear as far as it has gone, and there is obviously no intention here to have anything but the exact facts stated by this witness. I just want to make it clear just what these are in case it becomes important to know anything about any of these numbers and what the actual releases were in any particular year. We have already, if your Honor will recall, admitted the approximate correctness of the asserted releases of each year as they were put in the notice to admit.

By Mr. McClennen:

Q. This identification 338 of October 24, 1932, a purported copy of a letter, somebody was set to digging for the letter described in the subpoena?

A. Yes, sir.

Q. And it was reported to you that that letter could not be found?

A. Yes, sir.

Q. And this Exhibit 338 for identification was brought to you and that is all you know about that?

[fol. 1460] A. Yes, sir.

Mr. McClennen: That is all.

Redirect examination.

By Mr. Wright:

Q. As I understand it, Mr. Jenkins, you are going to produce for us any release schedules you have—any records

that you have that will supply a more accurate record of the titles and dates of the feature pictures released by you than those you have here today?

A. Yes. We thought we had them here today. When we found we did not we tried to make up the deficiency from our local exchange.

Q. How soon do you think we can have those?

A. I will put them in the mail Monday. I will mail them to Mr. Caskey.

Mr. Wright: I understand when those arrive we may substitute those for the schedules that have been identified, without recalling Mr. Jenkins?

Mr. McClennen: We have had so much record we had just put them in as a separate exhibit. If we have the list of names at all—I am abstaining from any comment as to whether it is of the slightest consequence to have those [fol. 1461] names, but if it is of consequence to have them all we want is to be assured that we have the right ones.

Mr. Wright: The only question now is whether we have to recall Mr. Jenkins to the stand to give you that assurance. Will you be satisfied by his mailing to you and us the documents that he says are accurate?

Mr. McClennen: If Mr. Jenkins will send a statement on his own investigation that the list that he is furnishing is the final list of the season, of those that were actually released, and the date of the actual release, why, we shall be entirely content to treat that as correct.

The Witness: 1931-1932?

Mr. Wright: Through 1943-1944. That is the last one you have here.

Mr. McClennen: It is quite likely that you already have in some printed form some compilation of all those in one document on which you could put the date of actual releases, and if it has your certificate to accuracy that is all we are interested in. Mr. Rogers suggests that when the question [fol. 1462] of admissibility comes up they ought not to go beyond the understood date of the 1941-1942 season.

Mr. Wright: Let me say with respect to that date, the only limitation on our proof is that we said we did not expect to show violations of the Act during the period that the consent decree was in effect. However, it may be necessary from time to time to introduce evidence of events which occurred at a later period in so far as they may reflect on law violations occurring during the prior period.

Mr. McClennen: I don't concede in any way that that would call for the introduction of a schedule of releases.

Mr. Wright: No, I do not know whether it would or not. I am not offering such a schedule. All I am doing is identifying material.

Mr. McClennen: I just said to the Court that when the question of admissibility came up that could be dealt with.

The Court: It has only been marked for identification thus far. So whatever Mr. Jenkins sends here, it will be [fol. 1463] marked for identification and of course you can object to it.

Mr. McClennen: My only reason for speaking with reference to this is that Mr. Rogers, with his experience at the earlier time, wanted to make sure that we were not departing from that understanding.

Mr. Rogers: That was the deal line of May, 1942, if your Honor will recall that.

Mr. Wright: We have another witness here who wanted to get away this evening. I do not know if your Honor is willing to sit. I think it will be a convenience to him and to us. We will probably need another recess to mark the documents, for a few minutes.

The Court: How long will it take?

Mr. Wright: I think the direct examination will take about the same length of time as Mr. Jenkins.

The Court: We will take a five-minute recess.

(Short recess.)

(Folders containing schedules, etc., marked as Plaintiff's Exhibits 339 to 349, inclusive, for identification.)

[fol. 1464] Richard P. Morgan, recalled in behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination.

By Mr. Wright:

Q. Mr. Morgan, I will hand you this letter, a copy of a letter from J. J. Unger to Mr. Grafiades, dated June 1, 1933, marked Exhibit 244 for identification, and ask you if that is the document that was missing from the group identified this morning?

A. It is.

Q. And that is produced by you pursuant to the Paramount subpoena?

A. That is correct. We were unable to locate the original copy, but this copy was in our file.

Q. Have you brought with you the document produced in response to paragraph 2 of the subpoena served upon Paramount, returnable May 19, 1944?

A. I have.

Q. That calls for all license agreements for the exhibition in the following towns of feature pictures released during the period indicated:

Auburn, New York, 1932-1933, 1935-36 inclusive; Norwich, New York, 1931-32 to 1937-38 inclusive. Amsterdam, New [fol. 1465] York, 1931-1932 to 1936-37 inclusive. Little Falls, New York, 1931-32 to 1935-36 inclusive. Tiffin, Ohio, January 1, 1936, to March 1, 1938. Corbin, Kentucky, August 1, 1938 to May 1, 1940. Paris, Kentucky, June 1, 1937 to June 1, 1940. Van Wert, Ohio, January 1, 1934 to December 1, 1935. Bucyrus, Ohio, January 1, 1934 to January 1, 1937. Delaware, Ohio, January 1, 1934 to January 1, 1938. Salisbury, Maryland, January 1, 1937 to January 1, 1942.

A. Pursuant to the subpoena I produce herewith a folder, marked Exhibit 339 for identification, containing the documents referred to in paragraph 2 of that subpoena.

Q. And have you there all license agreements entered into between January 1, 1932, and September 1, 1937, which provide for the exhibition of feature pictures in the Strand Theatre, Seneca Falls, New York?

A. I have.

Q. Those are in the folder marked for identification as Exhibit 340?

A. That is correct.

Q. And have you all license agreements entered into between January 1, 1931, and May 1, 1939, which provided for the exhibition of feature pictures in the Fox, State, Plaza or [fol. 1466] Palace Theatres, Corning, New York.

A. I have, and I produce them herewith in the folder marked Exhibit 341 for identification.

Q. You have all license agreements entered into between January 1, 1931, and September 1, 1936, which provide

for the second-run exhibition of feature pictures in Lockport, New York?

A. I have, and produce them herewith in the folder marked Exhibit 342 for identification.

Q. And have you all license agreements entered into between January 1, 1932, and January 1, 1939, which provide for the second run exhibition of feature pictures in the Olympic, Strand, Liberty, Victoria or Palace theatres, Watertown, New York.

A. I have, and produce them herewith in folder No. 343 for identification.

Q. Have you all license agreements entered into between June 1, 1934, and July 1, 1938, which provide for the second-run or subsequent run exhibition of feature pictures in Ashland, Ohio?

A. We were unable to locate any such contracts.

Q. Do you have all license agreements entered into between January 1, 1936, and January 1, 1939, which provide for the second-run or subsequent-run exhibition of feature pictures in Van Wert, Ohio?

[fol. 1467] A. I have and produce them herewith in the folder marked Exhibit No. 344 for identification.

Q. Do you have all applications made between August 1, 1936 and October 1, 1937, by Harold Shreffler for license agreements providing for the exhibition in the Castamba Theatre, Shelby, Ohio, of feature pictures released during the 1937-1938 and 1938-1939 motion picture seasons?

A. We were unable to locate any such contracts.

Q. Do you have all license agreements entered into between August 1, 1934, and January 1, 1941, which provide for the second-run or subsequent-run exhibition of feature pictures in Mt. Vernon, Ohio?

A. I have and produce them herewith in folder marked Exhibit 345 for identification.

Q. Do you have all license agreements entered into between June 1, 1936, and October 1, 1939, which provide for the exhibition of feature pictures in the Opera House, Lexington, Kentucky?

A. I have and produce them herewith in the folder marked Exhibit 346 for identification.

Q. Do you have all license agreements entered into between August 1, 1937, and August 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Corbin, Kentucky?

[fol. 1468] A. Other than those heretofore produced I have none.

Q. Do you have all license agreements entered into between June 1, 1938, and January 1, 1942, which provide for the second-run or subsequent-run exhibition of feature pictures in Harlan, Kentucky?

A. We were unable to locate any such contracts.

Q. Do you have all license agreements for the exhibition of motion pictures in the following towns entered into during the periods indicated with respect to each town:

Cumberland, Maryland, 1935-1936 through 1943-1944, St. Michaels, Maryland, 1935-36 through 1940-41; Easton, Maryland, 1934-35 through 1940-41; Federalsburg, Maryland, 1934-35 through 1940-41; Hurlock, Maryland, 1934-35 through 1940-41; Salisbury, Maryland, 1934-35, 1935-36 and 1943-44; Pikeville, Kentucky, 1933-34, 1935-36, 1937-38 and 1943-44; Lexington, Kentucky, 1934-35, 1940-41 through 1943-44; Corbin, Kentucky, 1934-35 through 1937-38, 1941-42 and 1943-44; Middlesboro, Kentucky, 1935-36 through 1940-41; Harlan, Kentucky, 1935-36 through 1941-42; Maysville, Kentucky, 1933-34 through 1937-38 and 1940-41 through 1943-44.

[fol. 1469] A. I have and produce them herewith in the folder marked 347 for identification.

Q. Have you produced anything in response to the subpoena returnable June 3, 1944, which calls for all license agreements for motion pictures entered into between January 1, 1935, and September 1, 1940, with Ralph T. Kemper, Halmer D. Schreffler, Tom Gregory, Louise Stoll (Mrs. Francis D. Reeh), Belpik Theatre Corporation, Schine Shelby Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Castamba, State and Opera House theatres in Shelby, Ohio?

A. We were unable to locate any such contracts.

Q. And have you all license agreements for motion pictures entered into between January 1, 1933, and September 1, 1938, with Arthur J. Buck, Ural Buck, C. Kahn, Ted Vermos, Belpik Theatre Corporation, Civic Theatres, Inc., Fostoria Theatres Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibi-

tion of motion pictures in the Civic, Roxy, State and Colonial theatres in Fostoria, Ohio?

A. I have and produce them herewith in the folder marked Exhibit 348 for identification.

[fol. 1470] Q. Have you all license agreements for motion pictures entered into between January 1, 1936, and September 1, 1940, with P. E. Essick, Myer Fine, Medina Temple Theatre Co., Medina-Princess Corporation, Medina Amusement Co., Schine Medina Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Medina Temple and Princess theatres at Medina, Ohio?

A. I have and produce them herewith in the folder marked Exhibit 349 for identification.

Q. Have you produced anything in response to the first paragraph of the subpoena returnable on August 15, 1944, which calls for all Paramount franchises and master agreements made between you and Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises, Schine Lexington Corporation, Pelpik Theatres, Inc., or Chesapeake Theatres Corporation, for the exhibition of feature films released by you during one or more of the motion picture seasons 1931-32 to 1940-41, inclusive?

A. Those have been heretofore produced in response to the subpoena returnable May 19, 1944.

Q. You have none other than those heretofore produced?

[fol. 1471] A. I have nothing further; that is correct.

Q. As I understand, with respect to the third item of that subpoena, "All printed schedules of feature motion picture films released by you during the period from August 1, 1931, to September 1, 1941", you will supply a complete list of the features released by your company during that period by titles and release dates for each; is that correct?

A. That is correct. I will do my best to have it in the mail Monday.

Mr. Wright: And, as I understand it, if Mr. Morgan states in the letter to Counsel for the defendant and us that those schedules are correct they may be accepted as such without recalling Mr. Morgan to the stand?

Mr. McClennen: Yes, reserving still, of course, the ques-

tion of whether they should go in evidence, but so far as the formal proof if Mr. Morgan will in any form give us his certificate that these were the names of the pictures released at each of those seasons, and the date of the release, we shall be content to take it as if he made the statement on the stand.

[fol. 1472] Q. Now, there are two license agreements that I hand you here which were previously marked for identification as P-69 and P-70, respectively. I believe those were produced pursuant to subpoena served upon your corporation. If so, we would like to have you so state.

A. That is correct.

The Court: They have been marked heretofore?

Mr. Wright: They have been marked for identification, but I think some question was raised about whether they came from Paramount files, and I offer this testimony to resolve that question.

The Witness: These are home office copies.

The Court: Any cross-examination?

Cross-examination.

By Mr. McClennen:

Q. Mr. Morgan, these contracts which you have produced, do they include any and all contracts for shorts? If they do, please so state.

A. If they do it is through inadvertence. I looked through them here and I did not see any short subjects in the contracts.

Q. That is, it was not your intention to collect short subject contracts?

[fol. 1473] A. No, sir.

Q. Do they contain any contracts for news?

A. No, sir.

Q. Do they contain any contracts for the spot bookings?

A. Yes, there are some spot booking contracts in there.

Q. What do you know as to whether all the spot bookings are included?

A. I understand that all of the spot booking contracts are not in there.

Q. You have spoken of some cases where you found no contracts. What do you know with respect to whether those contracts in this or other litigation have been dislocated

from the files or have gotten out in any other way; what knowledge have you on that?

A. Approximately two years ago I personally gathered together the contracts covered by the original subpoena in this case and at the time any of the contracts that were apparently missing I made a further search to determine whether or not we had served any pictures in that particular town during that season and my search and collection of the documents revealed to me the fact that we were able to produce contracts in every instance where we actually served pictures.

Q. That, you say, was your personal work of two years ago?

A. Yes, sir.

[fols. 1474-1475] Q. What check have you as to whether all that you had at that time in the way of contracts have gotten into this collection that you present here?

A. I can only tell you what I did with those contracts. After they were gathered two years or so ago they were put in our filing department in the home office and were kept intact there until they were turned over to Mr. Caskey for production in Buffalo.

Q. And as you produce them now they are as they have come back from Mr. Caskey to you?

A. Yes.

The Court: Well, have you any other witnesses here?

Mr. Wright: No.

The Court: Are you through with this witness?

Mr. Wright: Yes.

The Court: We will adjourn until 10 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until Friday, September 29th, 1944, at 10 o'clock *P.* M.)

[fol. 1476] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, September 29th, 1944, at 10 A. M.

Appearances:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for Defendants.

[fol. 1477] PROCEEDINGS

THOMAS F. MURRAY a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Murray?

A. 7617 Ditmars Boulevard, Jackson Heights, New York.

Q. What is your occupation?

A. I am manager of branch operations, Universal Film Exchanges, Inc.

Q. How long have you held that position?

A. Six years.

Q. You have been designated by Universal to appear here with the documents that were subpoenaed by the Government from Universal Film Exchanges, Inc.?

A. I have.

Q. Do you have with you the series of documents marked for identification with numbers 350 through 409, inclusive?

A. I have.

[fol. 1478] (Thereupon various document- were marked as Plaintiff's Exhibits Nos. 350 through 409, inclusive, for identification.)

Q. Those are produced pursuant to subpoena duces tecum that was served on Universal Film Exchanges, Inc.?

A. That is right.

Q. I will also hand you six documents which have been previously marked for identification here as Plaintiff's Exhibits 34, 35, 36, 37, 39 and 40 for identification, and ask you if those documents were also produced by you pursuant to subpoena duces tecum served on Universal Film Exchanges, Inc.?

A. Yes, sir, they were.

(Thereupon, six documents were marked as Plaintiff's Exhibits Nos. 34, 35, 36, 37, 39 and 40 for identification.)

Q. And in the course of your work at Universal have you had occasion to become familiar with the titles and duties and periods of employment of various sales representatives of that company?

A. I have.

Q. Can you tell us what position Paul Baron occupied during the year——

The Court: Spell that name.

Mr. Wright: (Spelling) B-a-r-o-n.

[fol. 1479] Q. During the year 1938?

A. He was Acting Branch Manager of the Washington Branch.

Q. Do you know what period he held that position?

A. I think for a period of about a year.

Q. Throughout the year 1938?

A. Throughout the year 1938.

Q. What position did Mr. W. F. Bork hold during the period from April, 1935 to November or to December, 1937?

A. He was Assistant Branch Manager of the Buffalo Branch.

Q. Do you know the total length of time he held that position?

A. He is presently engaged as a salesman in the branch.

Q. When did he cease being Branch Manager?

A. Assistant Branch Manager.

Q. Assistant Branch Manager?

A. Why, I could not tell definitely, but he has been continuously in the employ of Universal.

Q. I don't believe I asked you what Mr. Baron's duties were as Manager of the Washington Exchange, can you tell us that?

A. He supervises——

Mr. McClennen: Just one moment. I raise the same question as before. I don't want to be met on cross-examination with the suggestion that the witness is not [fol. 1480] qualified to speak on this subject. Therefore, I raise the objection in the direct. If I am to be permitted cross on the assumption that he is qualified to speak, I have no further interest in the objection.

The Court: We have to deal with the cross when we come to it, haven't we? I mean by that this: You object to the admission——

Mr. McClennen: I am objecting so that we may reach an understanding that I am to be permitted to cross-examine as freely as if this witness was qualified to speak on these subjects. The question came up.

The Court: It is obvious if he is allowed to testify as to what his duties are, of course, you can cross-examine.

Mr. McClennen: I have in mind the objection that was made.

The Court: How about it, Mr. Wright?

Mr. Wright: I don't suppose there is any question about Mr. McClennen's right to cross-examine any of these witnesses as to their testimony about what the duties of these people were. The only objection I made to Mr. McClennen's examination before was when he attempted to examine them on what was actually done or how these particular [fol. 1481] men performed these functions. That, of course, is something else.

The Court: Probably the Court would rule as it has before, as far as your cross-examination is concerned. It will rule as it has before on any of these examinations.

Mr. McClennen: I don't want to be met with an objection such as was pressed, even if it was overruled, as it was before, in the case of the first witness yesterday. I asked no

question that did not relate to a definition of the scope of those duties. I want to be in position to do the same with this witness. That is all.

[fol. 1482] The Court: Let me ask a question. You managed the New York branch?

The Witness: Manager of branch operation, in charge of the supervision of personnel in all 31 branches throughout the United States, excluding the sales force.

The Court: Does that include Washington?

The Witness: Yes, sir.

The Court: Objection overruled. Tell what his duties are, is that your question—the duties of the branch manager in Washington?

Mr. Wright: Yes.

Mr. Rogers: May I suggest that the witness testified that he was only acting branch manager, not branch manager?

The Witness: He had charge of the branch for the supervision of——

The Court: Did you say he was acting manager?

The Witness: He was acting branch manager.

The Court: Baron?

The Witness: Yes, sir.

The Court: Proceed.

The Witness: He had charge of the supervision of the personnel of the branch sales, directing the sales force [fol. 1483] in the local branch, covering the situations and possibilities in the territory for the purpose of negotiating sales of service of Universal's motion pictures.

Q. What were Mr. Bork's duties as assistant manager of the Buffalo branch?

A. Mr. Bork was in charge of the office personnel and the service department for the conduct of the business, the officer operation and the liquidation of the contracts in existence for delivery to the exhibitors.

Q. What position did Mr. P. T. Dana hold during the period from September, 1935, to February, 1938?

A. He was branch manager of the Albany branch.

Q. Do you know the total period of time he held that position?

A. No, I do not. He was transferred from there to Buffalo.

Q. His duties as manager of the Albany branch were the same with respect to Albany as Mr. Baron's were with respect to Washington?

A. Yes, sir.

Q. What position did Mr. J. R. Granger hold with Universal?

A. He was General Sales Manager.

Q. During what period?

A. I think a period of ten or twelve years prior to 1937.

Q. What were his duties as General Sales Manager?

[fol. 1484] A. He was in charge of establishing the policy for the sale and distribution of Universal's product throughout the 31 branches in the country.

Q. What position did Mr. A. J. Herman hold with Universal during the year 1938?

A. Mr. Herman was the branch manager of the Buffalo branch.

Q. Do you know how long he held that position?

A. I couldn't say definitely. It was only for a short duration of time.

Q. You know it was throughout the year 1938?

A. Yes, sir.

Q. And his duties were the same as those of the other branch managers you have described?

A. Yes, sir.

Q. What position did Mr. W. V. Kraemer hold with Universal during 1938?

A. He was manager of the contract department in the home office in New York.

Q. Do you know what period of time his position covered?

A. I couldn't say definitely. I think it was up until some time in 1937.

A. It began in 1937?

A. No, it preceded that, some seven or eight years preceding that.

Q. The question I asked you was what position he held in [fol. 1485] February, 1938.

A. In February, 1938, he did; he was manager of the contract department.

Q. What were his duties as manager of the contract department?

A. Contracts submitted by the branch and approved by the General Sales Manager were, in turn, turned over to him for the maintenance of the records and for the play-off of the respective accounts that had been sold.

The Court: What do you mean by the play-off?

The Witness: The dating of the subjects as they were reported by the branch, he would compile, or under his direction would be compiled, that play-off in the home office.

Q. A matter of keeping records?

A. Yes, keeping the records to show the progress of the liquidation.

Q. What position did Mr. B. R. Kreisler hold with Universal in June, 1939?

A. He was branch manager of the Washington branch.

Q. How long did he hold that position?

A. About a year and a half.

Q. Do you know what the beginning and the ending dates were?

A. He succeeded Mr. Baron in 1938.

Q. His duties were the same as those you described for Mr. Baron?

[fol. 1486] A. Yes, sir.

Q. What position did Mr. Paul Kreiger hold with Universal during the years 1936 and 1937?

A. He was branch manager of the Cincinnati branch.

Q. Do you know when he became branch manager there?

A. He was there some 15 years preceding that.

Q. When did he terminate as Cincinnati branch manager?

A. In the early part of 1939.

Q. His duties were the same with respect to that branch as those of the other branch managers you have referred to?

A. Yes, sir.

Q. What position did Mr. A. Marchetti hold in February, 1939?

A. He was the booker of the Albany branch.

Q. Do you know how long he held that job?

A. Some 15 years. He is the present booker in Albany.

Q. What are his duties as booker?

A. When a contract has been accepted and approved by the General Sales Manager it is returned to the branch and a cut-off card made and it is his duty to contact the accounts to effect the liquidation of the subjects that have been designated on that contract for service to the accounts.

Q. What position does Mr. Frank J. A. McCarthy hold with Universal?

[fol. 1487] A. Mr. McCarthy is the Eastern Division Manager.

Q. How long has he held that position?

A. I want to correct that. He was the Eastern Division Manager at that time. He is now the Southern Division Manager.

Q. When was he Eastern Division Manager?

A. Eastern Division Manager up until 1941.

Q. When did he become Eastern Division Manager?

A. Some ten years preceding that.

Q. And he held the position continuously for ten years prior to 1941?

A. That is right.

Q. What were his duties as Eastern Division Manager?

A. Of the offices designated for a division territory he had direct supervision over the District Manager and the branch managers for the sale of service of Universal product.

Q. What was the Eastern territory?

A. The Eastern territory at that time included Boston, New Haven, Buffalo, Albany, Cincinnati, Cleveland, Pittsburgh, Memphis, Atlanta, Charlotte, New Orleans and Dallas.

Q. The cities you have mentioned there were where Universal maintains exchanges?

A. Yes, sir.

[fol. 1488] Q. And he supervised the entire territory served by those exchanges?

A. Yes, sir.

Q. What position did Mr. Dave Miller hold with Universal during the period from April, 1934, through January, 1938?

A. He was District Manager of the offices covered by branches in Cincinnati, Pittsburgh, Buffalo and Albany.

Q. His headquarters were in New York?

A. His headquarters were in Cleveland.

Q. Do you know the total length of time he held that position?

A. For a period of about five or six years.

Q. What were his duties?

A. His duties were to supervise the branches within his district, the four branches, for the sale of service of Universal product.

Q. What position did Mr. Nate Sauver hold with Universal during the period from June, 1933, through February, 1938?

A. He was branch manager of the Buffalo branch.

Q. And his duties were the same as those of the other branch managers you have referred to?

A. Yes, sir.

Q. What position did Mr. J. J. Spandau hold with Uni-
[fol. 1489] versal during the month of November, 1940?

A. He was branch manager of the Albany branch.

Q. Do you know during what period he held that position?

A. For a period of about three and a half or four years.

Q. Do you know when it began and ended?

A. I couldn't say definitely, but I know it was within that period.

Q. His duties were the same as those of the other branch managers?

A. Yes, sir.

Q. What position did Mr. John J. Scully hold during the period from April, 1939, through April, 1941?

A. He was branch manager of the Buffalo branch.

Q. His duties as manager were the same as those of the other branch managers?

A. Yes, sir.

Q. What position does Mr. Adolph Schimel hold with Universal?

A. Mr. Schimel is Counsel and an attorney in our home office.

Q. He is employed full time at the home office?

A. Yes, sir.

Q. Do you know how long he has held that position?

A. About 15 years.

Q. Do you know what his duties are as home office counsel?

A. All matters pertaining to distribution arising out of controversies from contracts or developing of new legal
[fol. 1490] matter- are handled by Mr. Schimel.

The Court: Advisory, you mean, advising in the law?

The Witness: Yes, sir, in an advisory capacity.

The Court: His duties are only those of an attorney?

The Witness: As General Counsel.

[fol. 1491] Q. What position did Mr. W. A. Scully hold during the year 1939?

A. He was General Sales Manager.

Q. He succeeded Mr. Grainger?

A. Yes, sir.

Q. How long did he continue as General Sales Manager?

A. He is General Sales Manager.

Q. And his duties during the time he has been General Sales Manager are the same as those described for Mr. Grainger?

A. Yes, sir.

Q. What position did Mr. S. Whittman hold with Universal during May, 1937?

A. He was District Manager at the time covering the offices of Boston, New Haven, Albany and Philadelphia and Washington.

Q. Do you know how long he held that position?

A. He resigned some time in the early part of 1938. Preceding that he had been there for a period in excess of ten years.

Q. What were his duties as District Manager?

A. The duties were similar to that of Mr. Miller for those offices.

Q. He succeeded Mr. Miller in that position?

A. Mr. Miller, I think, succeeded him.

Q. Well, I thought according to your previous testimony [fol. 1492] Mr. Miller was District Manager from April, 1934 through January, 1938?

A. That is right. Mr. Whittman didn't have the Albany office. He just had the offices that Mr. Herman succeeded him in, of Boston, Philadelphia, New Haven and Washington.

Q. Then his duties were the same with respect to that territory as you previously described for Mr. Herman?

A. That is right.

Q. Well, I think your previous testimony has Mr. Herman in that position in November, 1938, is that right?

A. That is right.

Q. Well, then, Mr. Whittman didn't become District Manager until after that time?

A. Yes, sir.

Q. Now, what was Mr. Whittman's position in the month of May, 1937?

A. There was a change in his status in about that time. I would have to check it, Mr. Wright, to give the exact dates that he changed from his division status to district status to branch status.

Q. Could you check and do that for us when you are recalled to identify the contracts?

A. I will.

Q. Mr. Murray, do you know the period of time during [fol. 1493] which Mr. J. Myer Schine was Director of Universal?

A. I could not definitely say. I think he was Director up to—I have no definite knowledge of it except I think it was some time up to 1938.

The Court: 19—what?

The Witness: 1938.

Q. Do you know about how long before that?

A. I do not.

Mr. Wright: That is all for now.

Cross-examination.

By Mr. McClennen:

Q. Mr. Schine was a director elected by the preferred stockholders, was he?

A. I have no knowledge whatsoever of Mr. Schine's status except knowing by hearsay that he was a director of Universal.

Q. That you don't know the beginning day of?

A. No, sir, I do not.

Q. And you say the ending date was 1938?

A. To the best of my recollection.

Q. Mr. Schimel came in to the Law Department of Universal as an assistant?

A. I don't really know what the status was when he was originally engaged in Universal.

[fol. 1494] Q. Were you there then?

A. No, I was not.

Q. At some time he became what might be called the inside office advisor on law matters?

A. Yes, sir.

Q. For Universal?

A. Yes, sir.

Q. Now, have you the date when Mr. James R. Grainger first came to Universal?

A. I have not.

Q. Would it accord with your recollection that it was in the vicinity of 1935?

A. I was not identified with Universal at that time, and I would not want to harbor a guess.

Q. That is, when you came with Universal was when?

A. I came in 1938, March of 1938.

Q. 1938, and Mr. Grainger had already left Universal at that time?

A. Yes, sir.

The Court: Further questions?

Mr. Wright: We will recall Mr. Murray for the identification of other material. That is all for now.

The Witness: Do you want these documents?

Mr. Wright: Yes, leave those with the reporter with the [fol. 1495] other documents.

Edward M. Saunders, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Saunders?

A. At 1033 Cornfield Road, West Bronxville, New York.

Q. What is your occupation?

A. Assistant General Sales Manager, Loew's, Inc.

Q. How long have you held that position?

A. Since February, 1943.

Q. And prior to that?

A. I was Western Sales Manager for the same company.

Q. For how long?

A. Since 1924.

Q. What are your duties in your present position?

A. Well, general development of the thoughts and ideas and consultation with the General Sales Manager, Sales Managers, Branch Managers, District Managers.

Q. You were designated by Lowe's, Inc., to produce the documents which were subpoenaed from them by the Gov-
[fol. 1496] ernment for the trial of this case, were you?

A. Yes, sir, I was.

Q. And you have brought with you pursuant to the subpoena served on Loew's, Inc., documents which have been marked for identification as 410 through 515, inclusive?

A. I think there is one missing, as I understand.

The Court: 410 to 5 what?

Mr. Wright: 515.

The Witness: 504 is missing.

Q. That is, with the exception of 504?

A. With the exception of 504 they are here.

Q. That is the letter of August 31st, 1937, from E. K. O'Shea to F. D. Drew, of Cleveland?

A. What number is that?

Q. This 504?

A. I don't know which one that is.

Q. The remaining documents bearing those numbers are those that you have here?

A. That is right.

(Thereupon various documents were marked as Plaintiff's Exhibits Nos. 410 through 515, inclusive, for identification.)

The Witness: I think you took my papers there also.

(Document handed back to witness.)

[fol. 1497] Q. I believe you were requested to produce a letter of August 31, 1937 from E. K. O'Shea to F. D. Drew, Cleveland, regarding deal sheets covering houses taken over by the Schine interests at Fostoria, Medina, Ashland, Mount Vernon and Van Wert, Ohio; have you made a search for such a letter?

A. A search has been made for everything requested.

Q. You haven't been able to locate it?

A. Unable to locate it at this time. You see, there has been during a period of time, four of our men in the Legal Department, who are now in the service and they were handling this and making these searches, and it is very difficult, although very diligent search has been made.

Q. In the event you are able to locate it, may it be under-

stood it may be produced without the necessity of recalling Mr. Saunders to the stand to authenticate it?

Mr. McClennen: If Mr. Saunders will write that this is the paper that has been found, it will be as acceptable as his saying it on the stand.

By Mr. Wright:

Q. In the course of your duties with Loew's, Inc.——

Mr. McClennen: Just a moment. I take it it is understood I am simply speaking of the production without any ques- [fol. 1498] tion about its admissibility, which we wish to reserve.

Mr. Wright: Yes.

By Mr. Wright:

Q. Have you had occasion to become familiar with the titles and duties of the other sales officers of the company?

A. Yes, sir, I have.

Q. Can you tell us what position Mr. E. W. Aaron holds with Loew's?

A. Mr. Aaron at the present time is Circuit Sales Manager.

Q. How long has he held that position?

A. From February 1943 to date.

Q. What was his position prior to that?

A. From December, 1941 to February, 1943, he served as assistant general sales manager.

Q. Prior to that what position did he hold?

A. May, 1936 to September, 1937, he was assistant to Mr. T. J. Connors.

Q. I believe there is a gap between that time and the time he was assistant general sales manager. Can you tell us what his position was then?

A. There is a gap here between 1937 and 1941, that I don't have a record of.

Q. Could you specifically——

A. I beg your pardon. From 1936 to 1941,—prior to 1932 to May, 1936 and from September, 1937, to December, 1941, [fol. 1499] he was assistant to Mr. W. F. Rodgers.

Q. Mr. W. F. Rodgers was the General Sales Manager?

A. Mr. Rodgers at that time, yes, that is right.

Q. What were Mr. Aaron's duties as assistant to Mr. Rodgers?

A. Well, he took care of a lot of detail and matters of that kind for Mr. Rodgers, sending out letters of instruction that he might issue, and so on.

Q. And that was his position throughout the year 1938?

A. Yes, sir.

Q. What position did Mr. R. Berger have with Loew's, Inc., during the year 1938?

A. From 1935 to January, 1941, Mr. Berger was Branch Manager in charge of the Washington Exchange territory.

[fol. 1500] Q. And what were his duties as such exchange manager?

A. His duties and authority as such branch manager consisted in general of the direction of the activities carried on at the exchange. His activities consisted of solicitation of applications for license agreements from exhibitors in the Washington exchange territory and the transmittal of such applications to the principal executive office of Loew's Inc., in New York City, for approval or rejection; the performance of license agreements made by Loew's, Inc., as distributors of such pictures. As such exchange manager he had no authority, without the specific approval of the principal executive officers of Loew's, Inc., or the sales manager in New York, in each instance, to enter into any license agreement or consent to any modification thereof. He had no authority to formulate any of the policies of Loew's, Inc., or bind it by any action or statement inconsistent with said policy.

Mr. Wright: I object to that last statement there as a pure conclusion. I take it that it is not responsive to the quesion as to what his duties were.

The Court: Strike it out. You have stated all the duties, have you?

[fol. 1501] The Witness: I have stated the duties of Mr. Berger as branch manager.

By Mr. Wright:

Q. As branch manager he, of course, had the right to reject contracts, although he had no right to approve them: is that correct?

A. Well, not exactly. Possibly if he didn't make a satisfactory deal he would not write a contract.

Q. He had the decision——

A. The rejection would not remain with him.

Mr. McClennen: There is an objection to the question as a leading question.

The Court: Strike it out. State what his duties were.

By Mr. Wright:

Q. When somebody came in and wanted to make a license agreement would he have to submit a contract with that person?

A. No, he would not. If he cannot make what he considers a satisfactory license agreement then he would, in the course of events, so advise his district or sales manager.

Q. He did have discretion to determine in the first instance whether or not to forward a deal; is that right?

Mr. McClennen: That is objected to as leading.

The Court: Yes.

[fol. 1502] Mr. Wright: All right, I will not pursue it.

Q. What position did Mr. E. M. Booth have with Loew's during the period from May, 1931, through November, 1937?

A. Mr. Booth is my branch manager of the Cincinnati exchange territory.

Q. And he had the same duties with respect to Cincinnati as Mr. Berger had for Washington?

A. Exactly.

Q. What position did Mr. T. J. Conners hold with Loew's during the period from January, 1937, to June, 1939?

A. He was Eastern and Southern Sales Manager.

Q. Do you know how long he held that position?

A. From May, 1936, to December, 1941.

Q. What were his duties as Eastern and Southern sales manager?

A. Well, his duties were subject to the direction of the General Sales Manager, supervision of the activities of the branches located in his division.

Q. What did his division comprise?

A. We have made a number of changes in different periods and I don't happen to have the records so that I would hesitate to say exactly. I would be glad to——

Q. Throughout the period the territory included, did it not, the exchanges at Cincinnati, Cleveland, Albany, Buffalo, New York and Washington?

[fol. 1503] A. New York and Washington, I am positive they were. As to Buffalo, I am not sure.

Q. Do you think there might have been a time when Buffalo was not in the Eastern territory?

A. There was a time when Buffalo was in what we call our Central Division.

Q. Do you know whether that was prior to 1937?

A. I am not positive of that.

Q. You are sure that the other exchanges that I mentioned were included in the territory at all times?

A. Those that I mentioned, yes.

Q. What position did Mr. F. D. Drew hold with Loew's in the years 1937 and 1938?

A. I didn't have anything on that. Was information requested about Mr. Drew? I don't think I have anything on Mr. Drew.

Q. We were informed, I think by letter from your company, that Mr. Drew was the branch manager at Cleveland.

Mr. McClennen: I don't think that ought to be put in the record.

The Court: Strike it out.

Q. To refresh your recollection, I will show you this letter addressed to Wendell Birge from Loew's, Inc., dated May 22, 1944, and ask you if that will enable you to state the fact [fol. 1504] about Mr. Drew's employment (handing letter to witness)? Can you tell us now what position Mr. Drew held during 1937?

A. I am not positive of that. I think that Drew was the branch manager in Cleveland but I am not positive of the date. I just don't like to answer you without being sure of it. I think that he was the branch manager in Cleveland. What is the year again?

Q. 1937.

A. I don't think he was. I am pretty positive he wasn't. I don't have any record of that here and that is why I hesitate to make a definite statement on it.

Q. I thought the letter might help you. If you will read the second page of the letter you will note that a statement appears as to Mr. Drew.

A. That is correct. Mr. Drew was branch manager from 9-25-1927 to January 31, 1942.

Q. That is at Cleveland?

A. That is at Cleveland; that is correct.

Q. His duties with respect to Cleveland were the same as those you previously described for Mr. Berger with respect to Washington?

A. That is right.

Q. Will you tell us what position Mr. Tyree Diller, Jr., held during 1938?

A. He was an attorney with the company.

[fol. 1505] Q. That is, he was employed full time at the home office?

A. That is correct.

Q. Do you know what his period of service in that job was?

A. 1935 until February of 1943.

Q. What were his duties?

A. His duties were limited to legal advice.

Q. What position did Mr. Jack E. Flynn hold during the period from May, 1931, to November, 1935?

A. Well, prior to 1932 to March, 1938, Mr. Flynn was District Manager, with supervision over Albany, Buffalo, Cincinnati, Cleveland, Detroit and Pittsburgh exchange territories.

Q. Where were his headquarters?

A. In Detroit.

Q. What were his duties as District Manager?

A. General supervision of the activities of the exchanges in his territory.

Q. And what position did Mr. J. Leonard Hirsch hold with the company during the year 1938?

A. Assistant to Mr. Conners and from January, 1941, to date, assistant to Mr. O'Shea.

Q. When did he first become assistant to Mr. Conners?

A. September, 1937.

Q. What were his duties as assistant to Mr. Conners?

A. His duties were to analyze applications received in [fol. 1506] the office and take care of the records of the office.

Q. What position did Mr. Ralph Maw hold with Loew's during the period from November, 1935, through the month of August, 1939?

A. Well, from 1926 to December 1, 1937, he was a salesman in the Buffalo office, and from December 3, 1937, to date, he has been branch manager of the Buffalo exchange.

Q. His duties as branch manager are the same as the other branch managers you have referred to?

A. That is right.

Q. What position did Mr. E. K. O'Shea hold with the company from June, 1934, through June, 1939?

A. Prior to 1932 to December, 1937, Mr. O'Shea was the branch manager in charge of the Buffalo exchange, and from December, 1937, to January, 1941, he was District Manager in charge of Albany, Buffalo, Charlotte, New York and Washington offices.

Q. What were his duties as District Manager?

A. General supervision of the activities of the exchanges in his territory.

Q. His duties as branch manager were the same as the other branch managers you have referred to?

A. That is correct.

Q. What position did Mr. Ralph Pielow hold with Loew's during the period from November, 1932, through December, [fol. 1507] 1935?

A. Branch manager in charge of the Albany exchange.

Q. Do you know the total period of his employment in that capacity?

A. He was branch manager there from 1928 to 1941.

Q. His duties were the same as those of the other branch managers?

A. That is correct.

Q. What position does Mr. W. F. Rodgers hold with Loew's?

A. He is General Sales Manager.

Q. How long did he hold that position?

A. From 1936 to date.

Q. And prior to 1936 what was his position with Loew's?

A. He was Eastern Sales Manager.

Q. How long dd he hold that position?

A. Well, from prior to 1932 up to 1936.

Q. Do you have the month in 1936 in which he became General Sales Manager?

A. May.

Q. What are his duties as General Sales Manager?

A. They include not only the supervision of the activities of all sales managers, branch and district managers throughout the entire country, but he also has the power to accept or reject contracts, authority to formulate policies for the company, and they are accepted, unless disapproved [fol. 1508] by the President.

Q. What were Mr. Rodgers' duties as Eastern Sales Manager?

A. General supervision of the offices in his particular district.

Q. Were they any more than that?

A. Yes, he also was authorized, as the Sales Manager, to accept or reject applications for service.

[fol. 1509] Q. And what was the territory included under his jurisdiction when he was Eastern Manager, Eastern Sales Manager, approximately?

A. Approximately, if I remember rightly, Boston, New York, Albany, New Haven, Philadelphia, Buffalo, Cleveland, Pittsburgh, and I believe Cincinnati and Detroit.

Q. And Washington?

A. Washington, yes, sir.

Q. What position did M. M. Ryan hold with Loew's during the—strike that out. Could you give me the exact date when Mr. Rodgers became Eastern Sales Manager?

A. I think the month, but I don't have the exact date. I gave you the month before, but I don't have the exact date. Oh,—Eastern Sales Manager?

Q. Yes, when be became Eastern Sales Manager.

A. Well, from prior to 1932.

Q. I understand you first, prior to 1932. I wonder if you could give me the month?

A. No.

Q. He was with the company prior to that time?

A. Yes, sir.

Q. Do you know in what capacity he was prior to the time he became Eastern Sales Manager?

A. To the best of my recollection,—it goes back a long way—he was kind of assistant to Mr. Grainger at one time.

[fol. 1510] Q. He was General Sales Manager?

A. He was the Eastern Sales Manager at that time.

Q. He was with the company throughout the period that you were with it, is that right?

A. Yes, he has been there since the merger of Metro-Goldwyn.

Q. What position did Mr. M. M. Ryan hold in the year 1938?

A. That is Miss Ryan?

Q. Miss Ryan.

A. She is Office Manager in the Buffalo Exchange.

Q. During what period?

A. Well, she is there now and she was there prior to 1932.

Q. Been there continuously during that time?

A. Been there a long while.

Q. What are her duties as office manager?

A. Kind of in charge of the routine work, clerical help, bookkeepers, etc., bookers.

Q. What position does Mr. W. Williams hold with the Company?

A. He is salesman in the Albany office.

Q. How long with respect to the year 1938 did he hold that position then?

A. In 1938 he was office manager in Albany.

Q. Throughout the year?

A. Yes, throughout the year 1938.

Q. And what were his duties as office manager at Albany?

[fol. 1511] A. The same as Miss Ryan.

Mr. Wright: You may cross-examine.

Mr. McClennen: No cross-examination.

Mr. Wright: That is all for now, Mr. Saunders. We will recall you later.

William Zimmerman, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Wright:

Q. Where do you live, Mr. Zimmerman?

A. I beg your pardon?

Q. Where do you live?

A. 120 East 73rd Street, New York City.

Q. What is your occupation?

A. I am a member of the R. K. O. Legal Department and Assistant Secretary of R. K. O. Radio Pictures, Inc.

Q. How long have you held that position?

A. I have been a member of the R. K. O. Legal Department for approximately 10 years, but have been made an assistant secretary within the last few months.

Q. You have been designated by R. K. O. Radio Pictures [fol. 1512] to produce the documents which were subpoenaed

from that company by the Government for production at the trial of this case?

A. I have been so designated.

Q. Have you brought with you the series of documents marked exhibits 516 to 537, inclusive for identification?

Mr. Wright: I thought these had been marked. Maybe we better have a recess and mark them.

The Court: All right, we will stand in recess for five minutes.

(Short recess.)

(During the recess various documents, referred to above, were then marked as Plaintiff's Exhibits Nos. 516 to 537, inclusive for identification.)

Q. Pursuant to that subpoena, have you brought with you the series of documents marked Exhibits 516 to 537, inclusive for identification?

A. I have.

Q. And those are the documents you have here in this folder?

A. They are.

Q. In the course of your employment by R. K. O., have you had occasion to become familiar with the duties and titles of the various sales personnel?

A. I have.

[fol. 1513] Q. What position did Charles Boasberg hold with R. K. O. Radio Pictures during the month of January 1938?

A. During the month of January, 1938, Charles Boasberg held the position of Buffalo Branch Manager.

Q. Do you know how long he held that position?

A. He held that position from March 22nd, 1937 to June 3rd, 1940.

Q. What were his duties as Buffalo Branch Manager?

A. As Buffalo Branch Manager, his duties were the supervision of the personnel of the branch. The personnel consisted of salesmen, whose duties were to solicit license applications and to assist in the liquidation of contracts; the bookers who arranged for the exhibition dates of the pictures licensed for the various exhibitors of the Buffalo territory; the back force—the back room force who arranged for the delivery of the prints to the theatres licensed to exhibit the pictures, and who also inspected and repaired

the prints to see that they were in condition to be used when delivered; the members of the collection department who, as may be assumed, arranged for the collection of the moneys due resulting from the exhibition of pictures; also there were a general stenographic and clerical force. In addition, the Buffalo Branch Manager personally negotiated the more important license applications in his territory and would [fol. 1514] assist, upon request, the various salesmen in the more difficult negotiations for license applications. Further all license applications obtained by the salesmen would be submitted to the branch manager for his approval before being sent to the home office for final approval.

Q. What position did Mr. Jack Chinnel hold with R. K. O. during the year 1938?

A. Mr. Jack Chinnel was then employed, and my records indicate, is still employed as salesman in the Buffalo Branch.

Q. What were his duties as such salesman?

A. His duties, as I have indicated before, the solicitation of license applications from the exhibitors assigned to him by the branch manager and assisting in the liquidation of the license applications obtained by him, which had ripened into contracts by reason of home office approval.

Q. What position did Mr. Harry T. Dixon hold during the period August, 1932 through March, 1936?

A. He was our Buffalo Branch Manager.

Q. He was Mr. Boasberg's predecessor?

A. He was not Mr. Boasberg's immediate predecessor.

Q. When did he cease being Branch Manager, then?

A. July 25th, 1936.

[fol. 1515] Q. And then who became Branch Manager?

A. Mr. T. J. Walsh who was Branch Manager from July 27th, 1936 to April 3rd, 1937.

Q. That was when Mr. Boasberg took over?

A. He took over a few weeks later.

Q. And the duties of Mr. Dixon and Mr. Walsh were the same as those of Mr. Boasberg?

A. They were.

Q. What position did Mr. C. R. Halligan hold during the period from September, 1932 through January, 1937?

A. He was the Albany Branch Manager.

Q. Do you know the total period of time he held that job?

A. He held that job from January 2nd, 1932 to May 29th, 1937.

[fol. 1516] A. And during that period his duties were the same with respect to that exchange as those of the other managers you have mentioned?

A. They were.

Q. What position did Mr. Bernard G. Kranze hold during the period from May, 1935, through November, 1938?

A. He was Albany branch manager.

Q. When did he become Albany branch manager?

A. He became Albany branch manager May 31, 1937, and continued as branch manager until April 7, 1941.

Q. And his duties were the same as those of Mr. Halligan?

A. They were.

Q. What position did Mr. E. L. McAvoy hold during the period from August, 1932, through November, 1938?

A. Mr. E. L. McAvoy was Eastern Division Sales Manager during that period.

Q. And do you know when he first assumed that position?

A. He first became Eastern Division Sales Manager in June of 1932 and continued in that capacity through October, 1939.

Q. What were his duties as Eastern Sales Manager?

A. As Eastern Division Sales Manager he was in charge of the Eastern and Southern portion of the United States, having under him the various branches located in that territory, and the district managers operating within that [fol. 1517] territory. He first had, in a general way, supervision over the activities of the branches, the branch managers and the district managers, in obtaining license applications and liquidation of contracts. In addition, with respect to the more important license applications in his territory, he would participate in the negotiations for such licenses. He would assist in difficult negotiations when requested to do so by the district manager. Further, he was delegated by the executive in charge of his Division with authority to finally approve the great majority of the license applications obtained from theatres located in his territory.

Q. Could you give us, roughly, the boundaries of his territory?

A. That changed from time to time and I do not know the geographical limits, but I do know that it included at all times Albany, Buffalo, Cincinnati, Cleveland, Washington, and, of course, New York.

Q. What position did Mr. H. J. Michalson hold with R. K. O. during the year 1936?

A. I think at that time he had already been designated as Short Subjects Sales Manager, but I don't have any record and it would be merely a conjecture on my part.

[fol. 1518] Q. You don't know what position he held on March 12, 1936?

A. I have just answered that, Mr. Wright.

Q. Could you find out for us and let us know?

A. I should be able to.

Mr. Wright: I take it that a letter from Mr. Zimmerman would be sufficient?

Mr. McClennen: A letter from Mr. Zimmerman would be deemed the same as his testimony.

Q. What position did Mr. William Dahler hold with R. K. O. during 1938?

A. I haven't the record before me and this would be in the nature of a conjecture. I would rather get the record on that.

Q. Could you tell us specifically what his position and duties were—could you find out for us and incorporate in a letter what his position and duties were—as of May 24, 1938?

A. I certainly will.

Mr. Wright: I take it that will also be acceptable in lieu of Mr. Zimmerman's testimony?

Mr. McClennen: The statement of what he was in what period would be all right. I think the letter had better not state anything about the duties because that might involve our wanting to ask some further questions.

[fol. 1519] By Mr. Wright:

Q. Do you know what duties Mr. Dahler had while employed by R.K.O.?

A. Mr. Dahler is still employed by R.K.O. I know the nature of the duties he now has.

Q. What capacity is he employed in now?

A. He is employed in the Contract Approval Department of the home office, with respect to the Eastern Division territory.

Q. And you don't know whether he held the same position in 1938?

A. I am not sure. I believe he did, but I am not positive.

Q. That will appear from your letter, I take it?

A. Yes.

Q. What are his duties as contract manager?

A. His duties are to examine the license applications as they come in from the branches, to compare their terms with the terms received from the same exhibitor with respect to that theatre in previous license applications and to advise after making such analysis, the Eastern Division Sales Manager concerning the approval or disapproval of the license applications.

Q. Do you have any knowledge as to what Mr. Michalson's duties are, or were?

A. During 1936?

[fol. 1520] Q. At any time.

A. Well, yes, I have a knowledge of what his duties were.

Q. At that time during that year?

A. Not during that year but prior to 1936.

Q. What was he doing then?

A. Prior to 1936 he was district manager in charge of a district, which included the Cincinnati and Cleveland branches, and later included the Buffalo branch.

Q. You don't know whether he continued in that capacity through March 1, 1936, or not?

A. My records indicate that he continued as district manager to July, 1935.

Q. Do your records show what he did after that date?

A. My records do show.

Mr. Wright: Well, as I understand it, you are unwilling to accept a letter from Mr. Zimmerman as to what Mr. Michalson's duties were on that day, but you are willing to accept a letter as to what his position was?

Mr. McClennen: Yes. I take it in the course of Mr. Zimmerman's testimony he will have stated the duties connected with the different positions, and if the letter is merely confined to the time when the men in question held [fol. 1521] those positions the whole field will be covered, and I suppose if anything was said in the letter about what his duties were that it could probably be acceptable, but it occurs to me that there might be something come in on which I would want to know more.

The Court: These positions run the same, don't they? I mean practically the same?

Mr. McClennen: Yes.

The Court: If he was district manager we have already the evidence as to what the duties of a district manager are.

Mr. McClennen: If his letter merely says that he was district manager during such a period it would cover the whole field.

The Court: Well, he can submit the letter.

By Mr. Wright:

Q. Mr. Jules Levy was the General Sales Manager, was he not, for the period from March, 1932, during October, 1939?

A. Yes.

Q. And what were his duties as General Sales Manager?

A. His duties as General Sales Manager were to assist the executive in charge of distribution in the formulation of [fol. 1522] a general sales policy, to personally participate with the executive in charge of distribution or alone in negotiations for the more important license applications.

Q. To whom are you referring as the executive in charge of distribution?

A. The executive in charge of distribution was Ned E. Depinet.

Q. That is, he held the position of Vice President in charge of distribution during the same period?

A. He did.

Q. And Mr. A. W. Smith, Jr., was General Sales Manager from June, 1940, to July, 1942, was he not?

A. He was.

Q. And his duties during that period were the same as Mr. Levy's?

A. They were.

Q. Then from July, 1942, to date, Mr. Robert Mochrie has been General Sales Manager?

A. He has.

Q. And his duties are the same as the others?

A. They are.

Q. Then Mr. A. W. Smith, Jr., became Eastern Division Sales Manager in October, 1939, and continued in that position to June, 1940, did he not?

A. He did.

[fol. 1523] Q. And his duties in that capacity were the same as those of Mr. McAvoy?

A. They were.

Q. And Mr. Robert Mochrie held the position of Eastern Division Sales Manager from June, 1940, to July, 1942, did he not?

A. He did.

Q. And his duties as such were the same as those of Mr. Smith and Mr. McAvoy?

A. They were.

Q. Since July, 1942, the position of the Eastern Division Sales Manager has been held by Mr. Nat Levy?

A. That is correct.

Q. His duties were the same as those of his predecessors?

A. They are.

Q. During the period from January, 1932, through December, 1943, the Cincinnati branch manager has been Mr. S. C. Jacques?

A. Mr. S. C. Jacques, he is still employed as branch manager.

Q. January, 1932, to date?

A. Yes.

Q. Mr. H. H. Greenblat was manager of the Cleveland exchange, was he not, from August, 1933, until May 8, 1939?

[fol. 1524] A. That is correct.

Q. And the duties of Mr. Greenblat and Mr. Jacques were the same as those of the other exchange managers?

A. They were.

Q. And the manager of the Washington exchange was Mr. R. J. Folliard, from May 2, 1932, to August 1, 1942?

A. That is correct.

Q. And from that time to date that position has been held by Mr. J. D. Brecheen?

A. It has.

Q. And his and Mr. Folliard's duties were the same as the other exchange managers you have described?

A. They were.

Mr. Wright: You may cross-examine.

Mr. McClennen: Nothing.

[fol. 1525] Mr. Wright: Mr. Zimmerman says he can identify the two employees I asked him about. I will ask him to resume the stand and do that, and then we will recall Mr. Saunders.

WILLIAM ZIMMERMAN resumed the stand in behalf of the Plaintiff, testified further as follows:

Further direct examination.

By Mr. Wright:

Q. Can you now tell us what Mr. H. J. Michaelson's position was, Mr. Zimmerman, on March 12th, 1936?

A. Yes, he was "R.K.O. Short Subject Sales Manager" located at the home office.

Q. What period did he hold that position?

A. I don't know the period he held that position, except I know he is still holding it.

Q. What were his duties?

A. His duties were to generally supervise the solicitation for license applications, solicitation of license applications for short subjects by the R.K.O. branches, Branch Managers and District Managers throughout the United States, to formulate policy, sale policy with respect to the licensing [fol. 1526] of short subjects and to personally negotiate some of the more important license applications.

Q. Now, can you tell us what Mr. William Dahler's position was on May 24th, 1938?

A. His position was the same as the one he now holds, namely, in the Contract Approval Department at the home office.

Q. And I believe you already described his duties?

A. Yes, sir, I did.

Mr. Wright: Thank you, that is all.

EDWARD M. SAUNDERS recalled for the Plaintiff, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Mr. Saunders, you have produced here, have you not, the license contracts subpoenaed from Loew's, Inc., by the Government for production at the trial of this case?

A. Yes, sir, I have.

Q. And I will ask you for the agreements which have been produced in response to paragraph 2 of the subpoena returnable May 19th, which calls for all license agreements for the exhibition of feature pictures in the following towns [fol. 1527] entered into during the periods indicated with respect to each town: Bucyrus, Ohio, January 1st, 1934 to January 1, 1936; Van Wert, Ohio, January 1, 1934 to December 1, 1935; Tiffin, Ohio, January 1, 1936 to March 1, 1938; Medina, Ohio, January 1, 1937 to January 1, 1939; Mount Vernon, Ohio, June 1, 1934 to January 1, 1941; Corbin, Kentucky, August 1, 1938 to May 1, 1940; Paris, Kentucky, June 1, 1937 to June 1, 1940.

A. They are here.

Q. Those are the documents placed in this folder which we will ask to have marked as exhibit——

The Court: Is it already marked?

Mr. Wright: 604.

The Court: What?

Mr. Wright: This will be marked 604 for identification, because there is an intervening group of Warner documents that have already been marked, but which have not yet been produced here.

The Court: You referred to these before as 410 to 515.

Mr. Wright: 515 is the last exhibit number, but inasmuch as these Warner documents have already been marked by him, 515 to 603, inclusive——

[fol. 1528] The Court: Warner documents?

Mr. Wright: Yes, there are documents which will be identified by the Warner representative. He wasn't here at the moment, so in order to proceed and not throw those out of order we will give the Loew numbers beginning with 604 and the intervening numbers will be filled in with Warner documents.

The Court: They are marked already, 410 to 515?

Mr. Wright: Those are the R.K.O. documents.

The Court: Yes, that is what you are inquiring about now.

Mr. Wright: No, what we are inquiring about now are license agreements produced by Loew's, Inc., and we are asking to have the first exhibit marked with No. 604, because we have already marked some intervening Warner documents with the numbers 516 to 603.

The Court: These have not been marked before at all?

Mr. Wright: No.

The Court: I thought you were going back to the other documents.

Mr. Wright: These are new exhibits.

The Court: What number is it?

Mr. Wright: This folder produced in response to para-
[fol. 1529] graph 2 of the subpoena of May 19, 1944, which I just read, will be marked Exhibit No. 604 for identification.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 604 for identification.)

Mr. Wright: I have been reading paragraph 2 of the subpoena, and my attention has been called to the fact that I omitted the latter part of it which reads as follows:

"Lockport, New York, motion picture seasons 1931-32 to 1935-1936, inclusive; Norwich, New York, 1931-1932 to 1937-1938, inclusive; Amsterdam, New York, 1931-1932 to 1936-1937, inclusive; Massena, New York, 1931-1932 to 1934-1935, inclusive; Little Falls, New York, 1931-32 to 1935-1936, inclusive."

Q. Mr. Saunders, have you the documents, or what documents have you produced in response to paragraph 3 of the subpoena which calls for all license agreements entered into between June 1, 1934 and July 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Ashland, Ohio?

[fol. 1530] A. They are here.

Q. In this folder, which we will have marked as Plaintiff's Exhibit No. 605 for identification?

A. Yes, sir.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 605 for identification.)

Q. Have you produced all license agreements entered into between May 1, 1935 and March 1, 1938, which provide for the exhibition of feature pictures in the Star Theatre, Delaware, Ohio?

A. I understand it cannot be found.

Q. You have no such agreements in your file?

A. It cannot be located.

Q. Do you have any record which shows they were entered into, that you did have such agreements?

A. There is no contract, I understand. A search has been made for them so far and they are not able to locate them.

Q. They are not in your file?

A. No.

By the Court:

Q. Would there be any book records?

A. Could be, I don't know.

[fol. 1531] Q. What?

A. Could be, it is possible.

Q. I mean, with reference to the agreements?

A. Possible.

By Mr. Wright:

Q. Do you have all license agreements entered into between January 1, 1935 and January 1, 1941, which provide for the second-run or subsequent-run exhibition of feature pictures in Van Wert, Ohio?

A. Yes, sir.

Q. They are here?

A. Yes, sir.

Q. Those are the documents in this folder marked as Exhibit No. 606 for identification?

A. Yes, sir.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 606 for identification.)

Q. Have you produced all license agreements entered into between June 1, 1936 and October 1, 1939, which provide for the exhibition of feature pictures in the Opera House, Lexington, Kentucky?

A. That is paragraph 6?

Q. That is contained in paragraph 6 of the subpoena?

[fol. 1532] A. We have.

Q. Those are in this folder marked Plaintiff's Exhibit No. 607 for identification?

A. Yes, sir.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 607 for identification.)

By Mr. Wright:

Q. Have you all license agreements entered into between August 1, 1937 and August 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Corbin, Kentucky?

A. Paragraph 7.

Q. Those are in this folder marked paragraph 7 which we will have marked as Plaintiff's Exhibit No. 608 for identification?

A. Yes, sir.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 608 for identification.)

Q. Have you all license agreements entered into between June 1, 1938 and January 1, 1-42, which provide for the second-run or subsequent-run exhibition of feature pictures in Harlan, Kentucky?

[fol. 1533] A. In this folder.

Q. In the folder marked paragraph 8 which we will have marked as Exhibit No. 609 for identification?

A. Yes, sir.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 609 for identification.)

Q. Do you have all license agreements entered into between January 1, 1932 and September 1, 1937, which provides for the exhibition of feature pictures in the Strand Theatre, Seneca Falls, New York?

A. Yes, those are marked paragraph 9.

Mr. Wright: Which we will have marked as 610 for identification.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 610 for identification.)

Q. Do you have all license agreements entered into between June 1, 1931 and May 1, 1939, which provide for the exhibition of feature pictures in the Fox, State, Plaza or Palace Theatres, Corning, New York?

A. In this folder marked paragraph 10.

Mr. Wright: Which we will ask to have marked for identification as Exhibit No. 611.

[fol. 1534] (Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 611 for identification.)

Q. Do you have all license agreements entered into between January 1, 1932 and January 1, 1940, which provide for the second-run exhibition of feature pictures in Auburn, New York?

A. In this folder marked paragraph 11.

Mr. Wright: Which we will ask to have marked as Exhibit No. 612 for identification.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 612 for identification.)

Q. Do you have all license agreements entered into between January 1, 1932 and January 1, 1939, which provide for the second-run exhibition of feature pictures in the Olympic, Strand, Liberty, Victoria or Palace Theatres, Watertown, New York?

A. Here it is, folder marked paragraph 12.

Mr. Wright: Which we ask to have marked as Exhibit No. 613 for identification.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 613 for identification.)

[fol. 1535] Q. Do you have there the documents produced in response to paragraph 20 of the subpoena described as all license agreements for the exhibition of motion pictures in the following towns entered into during the periods indicated with respect to each town: Pikeville, Kentucky, motion picture seasons 1933 through 1936 and 1943-44, inclusive; Lexington, Kentucky, 1934-35 and 1940-1942?

A. We have been unable to locate anything in Lexington for 1934-35 season. The others are here.

Q. And Salisbury, Maryland, 1934-35 through 1943-44?

A. Yes, sir.

Q. You have there Harlan, Kentucky, 1936-37 and 1943-44?

A. Yes, sir.

Q. Maysville, Kentucky, 1933-34 through 1941-42?
A. Yes, sir.
Q. Corbin, Kentucky, 1943-44?
A. Yes, sir; Corbin is here.
Q. Middlesboro, Kentucky, 1935-36 through 1940-41?
A. Yes, sir.
Q. Richmond, Kentucky, 1933-34 through 1937-38?
A. Yes, sir.
Q. Cumberland, Maryland, 1935-36 and 1943-44?
A. Yes, sir.
Q. Easton, Maryland, 1934-35 and 1940-41?
A. That is right.
[fol. 1536] *A.* St. Michaels, Maryland, 1935-36 through 1940-41?
A. I don't see any St. Michaels here. I find that St. Michaels apparently hasn't been located.
Q. You produce no such agreement for St. Michaels?
A. No, I see none here.
Q. Federalsburg, Maryland, 1934-35 through 1940-41?
A. Yes, sir.
Q. Hurlock, Maryland, 1934-35 through 1940-41?
A. Yes, sir.
Q. Those you produce in response to this paragraph 20 are in this folder marked paragraph 20?
A. That is correct.

Mr. Wright: I will ask to have that marked as Exhibit No. 614 for identification.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 614 for identification.)

Q. Have you produced the documents called for in paragraph 1 of the subpoena returnable June 3rd, 1944, paragraph 1 of which calls for all license agreements for motion pictures entered into between January 1, 1935 and September 1, 1940 with Ralph T. Kemper, Halmer D. Schreffler, Tom Gregory, Louise Stoll (Mrs. Francis D. Reeh), Belpik Theatre Corporation, Schine-Shelby corporation, Schine [fol. 1537] Chain Theatres, Inc., Schine Enterprise Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Castamba, State and Opera House Theatres in Shelby, Ohio?
A. In this folder marked paragraph 1.

Mr. Wright: Which we will ask to have marked as Plaintiff's Exhibit No. 615 for identification.

(Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 615 for identification.)

Q. Have you all license agreements for motion pictures entered into between January 1, 1933 and September 1, 1938, with Arthur J. Buck, Ural Buck, C. Kahn, Ted Vermos, Belpik Theatre Corporation, Civic Theatres, Inc., Fostoria Theatres Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Civic, Roxy, State and Colonial Theatres in Fostoria, Ohio?

A. In this folder marked paragraph 2.

Mr. Wright: Which we will ask to have marked as Exhibit 616 for identification.

[fol. 1538] (Thereupon folder containing documents above referred to was marked as Plaintiff's Exhibit No. 616 for identification.)

Q. Have you there all license agreements for motion pictures entered into between January 1, 1936 and September 1, 1940, with P. E. Essick, Myer Fine, Medina Temple Theatre Company, Medina-Princess Corporation, Medina Amusement Company, Schine-Medina Corporation, Schine Chain Theatres, Inc., Schine Circuit and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Medina Temple and Princess Theatres at Medina, Ohio?

A. Those are paragraph 3.

Mr. Wright: Which we will ask to have marked as Plaintiff's Exhibit No. 617 for identification.

(Thereupon the folder containing documents referred to was marked as Plaintiff's Exhibit No. 617 for identification.)

Q. Have you produced in response to paragraph 1 of the subpoena served on Loew's, Inc., returnable August 15, 1944, the documents called for in the first paragraph, which asks for all franchises and master agreements made between you and Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises,

Schine-Lexington Corporation, Helpik Theatres, Inc., or [fol. 1539] Chesapeake Theatres Corporation, for the exhibition of feature films released by you during one or more of the motion picture seasons, 1931-32 to 1940-41, inclusive?

A. They are here in this folder marked paragraph 1, the one being apparently a photostatic copy.

Q. You have in this folder marked paragraph 1, a document entitled "Loew's, Inc., with Schine Enterprises Corporation," covering the seasons 1936-37 and through 1939-40, of which there is also a photostat in the folder?

A. A photostat in the folder, yes. It is the same thing, yes.

Mr. Wright: We will ask to have this folder containing those documents marked as Exhibit No. 618 for identification, and as I understand it, Loew's wishes to withdraw the original, and if that is agreeable to the counsel for defendants, and use the photostat?

Mr. McClennen: There is in the folder now an original and a photostat?

Mr. Wright: Yes.

Mr. McClennen: We have no objection to the original being withdrawn.

Mr. McKay: I would like to know if that is the same as L-1?

Mr. McClennen: Is that the same as L-1 that was asked for [fol. 1540] from us?

Mr. Wright: I understand that it is, with the difference that I recall your document marked L-1 was unsigned and, of course, may have had pencil notations which are not on here.

The Court: Mark it.

Mr. Wright: That is marked as Exhibit 618 for identification.

(Thereupon the folder containing documents above referred to was marked as Plaintiff's Exhibit No. 618 for identification.)

Q. Paragraph 3 calls for all printed schedules of feature motion picture films released by you during the period from August 1, 1931 to September 1, 1941. Do you have those schedules?

A. I have that in this folder marked paragraph 3.

Mr. Wright: We will ask to have that marked as exhibit 619 for identification.

(Thereupon the folder containing documents above referred to was marked as Plaintiff's Exhibit No. 619 for identification.)

Q. Paragraph 4 calls for contract or license agreement dated January 21, 1933, with Breckenridge Theatre Circuit and signed by Ed. Breckenridge for that Company, for [fol. 1541] feature pictures for exhibition at New Court Theatre, Bellefontaine, Ohio.

A. We have been unable to find it.

Q. You have made a search for it?

A. We have made a search for it and have been unable to find it.

Q. Paragraph 5 calls for contract or license agreement dated April 13, 1933, signed by M. A. Lebensburger for Opera Theatre Company, dated April 13th, 1933, for feature pictures for use at New Court Theatre, Bellefontaine, Ohio?

A. In this folder marked No. 5.

Mr. Wright: We will ask to have that marked as Exhibit No. 620 for identification.

(Thereupon the folder containing documents above referred to was marked as Plaintiff's Exhibit No. 620 for identification.)

Q. Paragraph 6 calls for contract or license agreement dated May 23rd, 1933 with Schine Theatrical Company, signed for it by George Lynch, for feature motion pictures for use in the Holland Theatre, Bellefontaine, Ohio?

A. In this folder marked paragraph 6.

Mr. Wright: Which we will ask to have marked as Exhibit No. 621, for identification.

[fol. 1542] (Thereupon the folder containing documents above referred to was marked as Plaintiff's Exhibit No. 621 for identification.)

[fol. 1543] Mr. Wright: That is all. There may be one thing that we will wish to recall Mr. Saunders for. I was under the impression that there was an inter-office memorandum or two, which was previously identified, which we would like to have him identify before he leaves today. We haven't had here now. We will check that during the recess.

I do not think we have another witness ready here at this time.

The Court: How many more will we have?

Mr. Wright: There will be Mr. Doherty to identify the Warner documents and Mr. Zimmerman will identify the R.K.O. license agreements, and then we will have possibly either Mr. Murray or Mr. McGrath to identify the Universal and United Artists license agreements, and I believe that will complete the distributor representatives. The Columbia representative was not able to get here at this time, so that his documents will be handled next week. When we conclude with that we would like to finish the identification of the documents produced in response to the Schine [fol. 1544] subpoena.

The Court: At this time, you mean?

Mr. Wright: Yes, after we get through with the distributor representatives.

Mr. McClennen: We will ask your Honor not to sit after 4 o'clock because the trains going out with the various Counsel are leaving then.

The Court: I thought perhaps we would conclude the testimony by that time.

Mr. Wright: We will do the best we can.

The Court: We will stand recessed until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 1545] After Recess, 2 P. M.

Appearances: Same as before noted.

Edward M. Saunders, a witness recalled by and on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination.

By Mr. Wright:

Q. Mr. Saunders, I show you this letter of August 31, 1937. It appears to be a copy of a letter from Mr. O'Shea to Mr. Drew, which has been marked Exhibit 504 for identification, and ask you if that is the document you said you had been unable to find this morning?

A. I don't recall the document you refer to, but I would say this is a copy of a letter from Mr. O'Shea to Mr. Drew.

Q. This is a document which was produced by you pursuant to the subpoena that was served on Loew's, Inc.?

A. This is the one we did not have, isn't it?

Q. Yes.

A. I would say this is a copy, as I said before, from Mr. O'Shea to Mr. Drew, and if you requested such a letter, I would say it is a copy of it.

[fol. 1546] Q. It came from Loew's file?

A. Yes, sir.

Q. I show you these documents that have been respectively marked for identification as Plaintiff's Exhibits 2, 13 and 58, and ~~ask you if those are~~ also documents which were produced by you pursuant to the subpoena served on Loew's, Inc.?

A. Well, I would say that this is a photostat copy of a letter written to our Cleveland office by the Memorial Theatre, Mount Vernon, Ohio, written from Cadiz, Ohio.

Q. You are referring by "this" to the document marked Exhibit 2 for identification?

A. Yes, sir.

Q. And this Exhibit 2 you believe came from your files, Loew's files?

A. I would imagine so, yes. I would think so.

Mr. McClennen: If your Honor please, may that answer be stricken out?

The Court: Yes.

Q. If you have any doubt about the matter, is there any one who could give us more information than you? As I understand it, these documents that you have in your hands, which were previously identified, were all furnished to us by your company pursuant to the subpoena. If that is the fact I want to know it now.

[fol. 1547] A. These were supplied by our company.

Mr. McClennen: Just a minute. That recital, I think, should go out.

The Court: Strike it out.

Mr. McClennen: If this witness knows anything about these things there is no objection to his stating it, but we do not want his inferences.

The Court: Strike it out. He may state what knowledge

he has of the existence of them and the source of his information. Where did you get that information?

The Witness: I got these letters from this gentleman here (indicating Mr. Wright).

Mr. Wright: These letters had been previously marked for identification in the suit back in June.

The Witness: May I ask, as you show them to me, were they submitted by our company?

Mr. Wright: That is correct.

The Witness: I do not think there is any question about them then. If they are submitted by our company they are photostatic copies taken from our file.

Mr. McClennen: May that go out, if your Honor please?

The Court: It may go out.

[fol. 1548] By Mr. Wright:

Q. If you don't know who with your company do you think could give us that information? As I understand it, you are the one who is designated to respond here to the subpoena.

A. I say again, if these, as you give them to me, were submitted by our company, I would say definitely they are from our files.

[fol. 1549] Mr. Wright: If the Court please, we specified the documents that we wanted to have identified in the letter to Loew's, Inc., asking them to send a representative who would be able to make the identification.

Mr. Caskey: These are not in that letter, Mr. Wright, you can't say that to the Court.

Mr. Wright: These are not?

Mr. Caskey: No, sir, they are not in that letter. You ought to withdraw that statement.

Mr. Wright: If they are not in there, they are not. I assumed we included them in the list.

The Court: By letter, you mean by that the letter of request?

Mr. Wright: Yes, there was a letter written August 31st.

Mr. Caskey: That letter refers to 410 to 508.

Mr. Wright: These documents here that had been previously identified were not included in the list of specified documents. I thought they had been, they should have been so included and were omitted by error. As I understand it, there is no question about the fact that they did come from

the files of Loew's, Inc. The documents were produced here last June by the representatives of that company at the [fol. 1550] time we had them marked.

The Court: The custodian of the records will have to be brought here, somebody in the office in charge of the files that will know whether it was there or it wasn't there, if Mr. Saunders doesn't know.

Mr. Wright: I would assume so. That is why I asked Mr. Saunders if he could not give us the information on that, who could.

Mr. McClennen: I take it it isn't anything this witness can testify about. Doubtless these can be traced to see whether

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Mr. Wright: Yes, I suppose we can call the secretary of the company and put him on the stand and ask him about them and, if he didn't know, call somebody else and on ad infinitum. We would like, for the convenience of all, to shorten it up as much as we can. I understand there isn't any question they did come from the files.

The Court: Apparently Mr. Saunders hasn't sufficient knowledge to testify.

By Mr. Wright:

Q. Mr. Saunders, will you undertake to find out and let us know who, in your company can supply us with informa- [fol. 1551] tion as to whether or not those documents did or did not come from the files of Loew's, Inc.?

A. Yes, I will be glad to. Will you just let me see them until I make a memorandum of what they are. I will be glad to do it.

Q. They are a letter dated January 15th, 1935 from E. Long, Memorial Theatre, Mount Vernon, Ohio, addressed to Metro-Goldwyn-Mayer Distributing Corporation at Cleveland, Ohio, dated January 15th, 1935?

A. January 15th to Metro-Goldwyn-Mayer, Cleveland.

Q. That was the document which was identified here as Exhibit 2. The document identified here as Exhibit 13 is a copy of a memorandum or letter from T. Dillard to F. D. Drew, dated April 7th, 1938, and relating to the subject matter, "Memorial Theatre, Mount Vernon.

The Court: The one mentioned here is the employee of the company.

Mr. Wright: Yes.

The Court: Is he still in the employ of the company?

The Witness: He is in the service at the present time.

Mr. Wright: Exhibit No. 58, which I believe was previously identified here by Mr. A. J. Buck is a letter from Mr. Buck to Mr. W. Rodgers; A. J. Buck, it is signed, addressed to Mr. W. Rodgers, Metro-Goldwyn Corporation, New York [fol. 1552] City, and is dated April 4th, 1936.

The Witness: I will be glad to look into this for you.

Mr. Wright: Are you willing to accept a letter from Mr. Saunders setting forth the result of his investigation, or will it be necessary for us to call some one else to state the facts in the event Mr. Saunders satisfies himself that they did come from their files?

Mr. McClennen: That will depend on whether on investigation we find that they did come from those files. If we find that they did, we shan't insist on formal proof. If there is doubt about it, we don't want it proved by a letter from a witness who manifestly knows nothing about it.

The Court: The question now is whether you are going to be satisfied they did come from the files by what proof is submitted.

Mr. Wright: He, as I understand it, is going to undertake to find out and advise us by letter. What I wanted to find out was whether his letter would satisfy you, or whether you would want testimony from him or somebody else.

Mr. McClennen: It will depend on what the letter says and what we find out.

[fol. 1553] The Court: You haven't seen the letter.

Mr. McClennen: I mean the proposed letter.

By Mr. Wright:

Q. After you have made your investigation to determine whether or not they did come from your files, will you write us a letter as to what is the result of the investigation and send a copy to Mr. McClennen?

A. I will be glad to.

Mr. Wright: Thank you very much.

The Witness: Are you through with me? Can I leave town now? Are you through with me?

Mr. Wright: Yes, sir.

The Witness: Thank you.

WILLIAM ZIMMERMAN was recalled as a witness in behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination.

By Mr. Wright:

Q. Mr. Zimmerman, did you bring with you the license agreements which were subpoenaed from R.K.O. Radio Pictures, Inc., by the Government for production at the trial here?

[fol. 1554] A. I brought over such documents as we had in our possession.

Q. Can you point out the documents produced in response to paragraph 2 of the subpoena returnable May 19, 1944, which calls for all license agreements for the exhibition of feature pictures in the following towns entered into between the periods indicated by respect to each town:

Norwalk, Ohio, January 1, 1934 to May 1, 1937;
Van Wert, Ohio, January 1, 1934 to December 1, 1935;
Tiffin, Ohio, January 1, 1936 to March 1, 1938;
Corbin, Kentucky, August 1, 1938 to May 1, 1940;
Paris, Kentucky, June 1, 1937 to June 1, 1940;
Shelby, Ohio, January 1, 1937 to January 1, 1939;
Mt. Vernon, Ohio, June 1, 1934 to January 1, 1941;
Delaware, Ohio, January 1, 1934 to April 1, 1938;
Bucyrus, Ohio, January 1, 1934 to November 1, 1935;
Auburn, New York, for the Motion Picture Seasons, 1932-33 to 1935-36 inclusive;
Norwich, New York, for the seasons, 1931-32 to 1937-38 inclusive;
Amsterdam, New York, for the seasons, 1931-32 to 1936-37 inclusive;
Little Falls, New York, for the seasons 1931-32 to 1935-36 inclusive?

[fol. 1555] A. In this folder I produce all of the documents which we have in response to paragraph 2 of that subpoena.

Mr. Wright: This folder is the one which is marked paragraph 2, which we ask to have marked as Exhibit 622 for identification.

(The folder referred to was marked as Plaintiff's Exhibit 622 for identification.)

Q. Have you there all license agreements entered into between June 1, 1934, and July 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Ashland, Ohio?

A. I have in this folder all of the documents called for by paragraph 3 of the subpoena of May 19, 1944, which we have in our possession.

Q. By "this folder" you are referring to this folder which is marked Exhibit 623 for identification?

A. I am.

(The folder containing documents called for by paragraph 3 of the subpoena of May 19, 1944, was marked as Plaintiff's Exhibit 623 for identification.)

Q. You have a folder there marked paragraph 4, which contains the documents produced in response to paragraph 4 of this subpoena calling for all license agreements [fol. 1556] entered into between June 1, 1936, and October 1, 1939, which provide for the exhibition of feature pictures in the Opera House, Lexington, Kentucky?

A. I have in this folder marked paragraph 4 those documents which we have in our possession called for by that paragraph.

Mr. Wright: I ask to have that marked as 624 for identification.

(The folder containing documents called for in paragraph 4 was marked as Plaintiff's Exhibit 624 for identification.)

Q. You have there all license agreements entered into between August 1, 1937 and August 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Corbin, Kentucky?

A. I have such as are called for by paragraph 5 of the subpoena as we have in our possession.

Q. I understand that you are producing no documents in response to paragraph 5? That calls for license agreements entered into between August 1, 1937, and August 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Corbin, Kentucky?

A. We haven't been able to locate any such documents.

Mr. Wright: The prior answer should be stricken out.

[fol. 1557] Q. You have there in a folder marked paragraph 6 the documents you have produced in response to request for all license agreements entered into between June 1, 1938, and January 1, 1942, which provide for the second-run or subsequent-run exhibition of feature pictures in Harlan, Kentucky?

A. Yes, such as we have in our possession.

Mr. Wright: I will ask to have that folder marked 625 for identification.

(The folder containing documents produced in connection with paragraph 6 was marked as Plaintiff's Exhibit 625 for identification.)

Q. Do you have any applications made by Ralph T. Kemper between January 1, 1937, and January 1, 1939, for license agreements providing for the exhibition in the State Theatre, Shelby, Ohio, of feature pictures released by RKO Radio Pictures, Inc.?

A. We have been unable to find any such applications.

Q. Have you produced all applications made by Joseph Felter, C. O. Frederick or Loyal Order of Moose No. 1248 between January 1, 1934, and January 1, 1937, for license agreements providing for the exhibition in the Moose Theatre, Norwalk, Ohio, of feature pictures released by RKO Radio Pictures, Inc.?

[fol. 1558] A. Yes, such as we have in our possession.

Q. Those are in this folder marked paragraph 9?

A. Yes, sir.

Mr. Wright: Which I will ask to have marked as Exhibit 626 for identification.

(The folder containing documents produced in connection with Paragraph 9 was marked as Plaintiff's Exhibit 626 for identification.)

Q. You have all license agreements entered into between January 1, 1932, and September 1, 1937, which provide for the exhibition of feature pictures in the Strand Theatre, Seneca Falls, New York, in this folder which is designated Paragraph 11?

A. Yes, such as we have in our possession.

Mr. Wright: I will ask to have that folder marked as Exhibit 627 for identification.

(The folder containing documents produced in connection with Paragraph 11 was marked as Plaintiff's Exhibit 627 for identification:)

Q. You have all license agreements entered into between June 1, 1931, and May 1, 1939, which provide for the exhibition of feature pictures in the Fox, State, Plaza, or Palace Theatres, Corning, New York, in this folder marked Paragraph 12?

[fol. 1559] A. Yes, such as we have in our possession.

Mr. Wright: I will ask to have that folder marked as Exhibit 628 for identification.

(The folder containing documents produced in connection with Paragraph 12 was marked as Plaintiff's Exhibit 628 for identification.)

Q. You have all license agreements entered into between January 1, 1931, and September 1, 1936, which provide for the second-run exhibition of feature pictures in Lockport, New York, in this folder marked Paragraph 13?

A. Yes, such as we have in our possession.

Mr. Wright: I will ask to have that marked as Exhibit 629 for identification.

(The folder containing documents produced in connection with Paragraph 13 was marked as Plaintiff's Exhibit 629 for identification.)

Q. You have there all license agreements entered into between January 1, 1932, and January 1, 1939, which provide for the second-run exhibition of feature pictures in the Olympic, Strand, Liberty, Victoria or Palace Theatres, Watertown, New York, in the folder marked Paragraph 14?

A. Yes, such as we have in our possession.

Mr. Wright: I will ask to have that folder marked as [fol. 1560] Exhibit 630 for identification.

(The folder containing documents produced in connection with Paragraph 14 was marked as Plaintiff's Exhibit 630 for identification.)

Q. You have all license agreements for the exhibition of motion pictures in the following towns entered into during the periods indicated with respect to each town:

Cumberland, Maryland, Motion Picture Seasons, 1935-36 through 1943-44;
St. Michaels, Maryland, 1935-36 through 1940-41;
Easton, Maryland, 1-34-35, through 1939-41;
Federalsburg, Maryland, 1934-35 through 1940-41;
Hurlock, Maryland, 1934-35 through 1940-41;
Richmond, Kentucky, 1933-34 through 1937-38;
Paris, Kentucky, 1937-38 through 1938-39;
Pikeville, Kentucky, 1933-34 through 1943-44;
Lexington, Kentucky, 1934-35 through 1943-44;
Middlesboro, Kentucky, 1935-36 through 1940-41;
Harlan, Kentucky, 1935-36 through 1941-42;
Maysville, Kentucky, 1936-37 through 1940-41?

A. Yes, such as we have in our posession.

Q. Those that are contained in this folder marked Paragraph 17?

A. Yes, sir.

Mr. Wright: I will ask to have that marked as Exhibit 631 for identification.

[fol. 1561] (The folder containing documents produced in connection with Paragraph 17 was marked as Plaintiff's Exhibit 631 for identification.)

Q. Those documents you have just referred to are contained in two folders, both marked paragraph 17; is that right?

A. Yes, sir.

Mr. Wright: I will ask to have this second one marked as Exhibit 631-A for identification.

(The second folder containing documents in connection with Paragraph 17 was marked as Plaintiff's Exhibit 631-A for identification.)

Q. Have you produced, in response to subpoena served on RKO Radio Pictures, Inc., returnable June 3, 1944, all license agreements for motion pictures entered into between January 1, 1935, and September 1, 1940, with Ralph T. Kemper, Halmer D. Schreffler, Tom Gregory, Louise Stoll (Mrs. Francis D. Reeh), Pelpik Theatre Corporation, Schine Shelby Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of

motion pictures in the Castamba, State and Opera House theatres in Shelby, Ohio?

[fol. 1562] A. Yes, sir, such as we have in our possession.

Q. And those are contained in this folder marked Paragraph 1 in the June 3, 1944, subpoena?

A. They are.

Mr. Wright: I will ask to have that marked Exhibit 632 for identification.

(The folder containing documents in connection with Paragraph 1, subpoena dated June 3, 1944, was marked as Plaintiff's Exhibit 632 for identification.)

Q. Have you there all license agreements for motion pictures entered into between January 1, 1933, and September 1, 1938, with Arthur J. Buck, Ural Buck, C. Kahn, Ted Vernes, Belpik Theatre Corporation, Civil Theatres, Inc., Fostoria Theatres Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Civic, Roxy, State and Colonial theatres in Fostoria, Ohio?

A. We were unable to find any such documents.

Q. Do you have there all license agreements for motion pictures entered into between January 1, 1936, and September 1, 1940, with P. E. Essick, Myer Pine, Medina Temple Theatre Co., Medina Princess Corporation, Medina [fol. 1563] Amusement Co., Schine Medina Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Medina Temple and Princess theatres at Medina, Ohio?

A. Yes, such as we have in our possession.

Q. Those are contained in this folder marked Paragraph 3?

A. Yes, sir.

Mr. Wright: We will ask to have that marked Exhibit 633 for identification.

(The folder containing documents in connection with paragraph 3 was marked as Plaintiff's Exhibit 633 for identification.)

Q. Have you produced in response to this subpoena, directed to RKO Radio Pictures, Inc., returnable August 15,

1944, all franchises and master agreements made between you and Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises, Schine Lexington Corporation, Pelpik Theatres, Inc., or Chesapeake Theatres Corporation, for the exhibition of feature films released by you during one or more of the motion picture seasons 1931-32 to 1940-41 inclusive?

A. We have been unable to find any such documents.

[fol. 1564] Q. Have you the printed schedules of feature motion picture films released by your company during the period from August 1, 1931, to September 1, 1941?

A. I have here printed schedules of releases from 1933-34——

Mr. Wright: This calls for August 1, 1931, to September 1, 1941.

A. 1933-34 through to 1942-43 motion picture season. Unfortunately I do not have a complete schedule for the 1931-32 season and the 1932-33 season, but I shall undertake to have one prepared as soon as I return to the home office.

Mr. Wright: Will it be agreeable to you, Mr. McClennen, if we accept such a schedule as Mr. Zimmerman proposes to prepare?

Mr. McClennen: If Mr. Zimmerman will send us a certificate that these were the release schedules we will be glad to take that as if he had testified to it on the stand, of course saving all our objections to its admissibility.

Mr. Wright: This folder containing the schedules that were produced will be marked 634 for identification.

(The printed schedules from 1933-34 to 1942-43 were marked as Plaintiff's Exhibit 634 for identification.)

Mr. Wright: That is all.

[fol. 1565] Herman M. Doherty, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Doherty?

A. 43 Blossom Heath Avenue, Lynbrook, Long Island.

Q. What is your occupation?
A. Auditor of exchanges.

The Court: What exchanges?
The Witness: All exchanges in the United States.

Q. You are an employee of Warner Pictures, Inc., or Vitagraph, Inc.?
A. Vitagraph.
Q. And how long have you held your present position?
A. 1925.
Q. What are your duties?
A. My position requires the supervision of all matters pertaining to auditing and accounting in the exchanges.
Q. Throughout the country?
A. That is right.
Q. You were designated by your company to produce the [fol. 1566] documents which were subpoenaed by the Government for production at the trial here?
A. That is correct.

Mr. McClennen: Mr. Witness, we all want to hear you.
The Witness: That is correct.
Mr. McClennen: Shout to this man at the far end of the table and the rest will hear you.

By Mr. Wright:

Q. The documents so produced by you include these that have been marked here for identification with the numbers 538 through 603?
A. Yes, sir.
Q. In the course of your employment have you become familiar with the titles of the sales representatives of Vitagraph?
A. Yes, sir.

(Thereupon documents above referred to were marked as Plaintiff's Exhibits Nos. 538 through 603 for identification.)

Q. Can you tell us what position Norman J. Ayres held with the Company during the year 1937?

The Court: Ayres?
Mr. Wright: (Spelling) A-y-r-e-s.
The Witness: He was Branch Manager in Albany.

Q. Albany, New York?

A. Yes, sir.

[fol. 1567] Q. Do you know the total period of time he held that position?

A. I didn't hear that.

Q. Do you know when he began and ended in that position?

A. Well, in that particular year he was the Branch Manager, is that what you mean?

Q. You don't have his beginning date and ending date?

A. November 7th, 1936 to September 24th, 1938.

Q. And, as I understand it, you, yourself, are not familiar with the duties of a branch manager?

A. That is correct.

Q. What position did Mr. F. W. Beiersdorf hold with the company during the year 1940?

A. He was the branch manager in Washington, D. C.

Q. The Washington Exchange?

A. Yes, sir.

Q. Do you know the period of time he held that office?

A. From May 8th, 1937 to July 19th, 1941.

Q. What position did Mr. R. H. Dunbar hold with the Company during the years 1940-41?

A. He was a salesman in Pittsburgh and also branch manager in Cincinnati.

Q. Can you give us the period when he was each?

A. Yes, sir, the period as salesman in Pittsburgh, November 8th, 1930 to November 23rd, 1940; branch manager, [fol. 1568] Cincinnati, November 25th, 1940 to April 18th, 1942.

Q. What position did Mr. R. H. Haines hold with the Company during the period from October, 1937 through July, 1940?

A. He was the Sales Manager in the East.

Q. Eastern Sales Manager?

A. Eastern Sales Manager.

Q. Do you know the length of time he held that position?

A. February 21, 1937 to February 13th, 1943.

Q. Do you know what territory was included in the Eastern Division?

A. Not exactly, but I could probably recite the branches from memory.

Q. Did it include the branches of Cincinnati, Cleveland, Buffalo, Albany, Washington and New York City?

A. That is correct.

Q. Do you know what his duties were in that connection?

A. No, sir.

Q. And Mr. S. W. Hatch held what position with the company?

A. During what period?

Q. During 1941?

A. He was the contract department manager, from March 27th, 1939 up to the present.

Q. You don't know what his duties were, either?

A. No, sir.

Q. Mr. P. S. Krumenacker held what position during the [fol. 1569] years 1939-1940?

A. He was the Branch Manager in Albany.

Q. That is during when, when did he begin that?

A. September 26th, 1938 to April 16th, 1944.

Q. And what position did Mr. Robert Mochrie hold with the company during the period from August, 1934 to October, 1936?

The Court: What was that name?

Mr. Wright: (Spelling) M-o-c-h-r-i-e.

The Witness: He was Eastern Sales Manager.

Q. Do you know when he began and ended in that position?

A. July 16th, 1934 to February 20th, 1937.

Q. And during that period the Eastern Division included the exchanges that were already mentioned?

A. That is correct.

Q. And Mr. Milton A. Mooney occupied what position with the company during the period from March, 1935 to October, 1936?

A. As Branch Manager at Cleveland.

Q. Do you know how long he held that position?

A. From September 25th, 1932 to January 1st, 1938.

Q. What position did Mr. Arthur Sachson—is that right?

A. That is correct.

Q. —hold with the company during the period from May, 1936 through 1941?

[fol. 1570] A. He had the position as contract department manager from August 7th, 1932 to March 26th, 1939, and the position of assistant to the Divisional Sales Managers from March 27th, 1939 to February 13th, 1943.

Q. Do you know what his duties were in either of those positions?

A. No, sir.

Q. What job did Mr. Gratwell Sears have with the Company while he was in its employ?

A. For all the period of time he was there, or any particular years?

Q. The period during which he was General Sales Manager, or Vice President in charge of sales?

A. He was Western Sales Manager from November 9th, 1930 to February 28th, 1931; the General Sales Manager for the West, February 29th, 1931 to October 31st, 1931. He was again the Sales Manager in the West, November 1st, 1931 to January 23rd, 1932.

Q. The period I meant to cover was simply that during which he was General Sales Manager of the Company; can you tell us what?

A. In between the two General Sales Manager positions, he was a Sales Manager. A Sales Manager is more like a Divisional Sales Manager, not like the General Sales Manager; that is why I was listing it.

[fol. 1571] Q. Specifically, what was his position during 1939?

A. 1939 he was the General Sales Manager.

Q. How long was he General Sales Manager?

A. August 9th, 1936 to October 25th, 1941.

Q. And that is the——

A. That is when he was, I would say, the overall General Sales Manager. There were some periods when he was just General Sales Manager in the West.

Q. And during this last period you have mentioned, he covered the entire United States operations?

A. That is correct.

Q. What position did Mr. H. A. Seed have with the Company in the year 1934?

The Court: What is the name?

Mr. Wright: (Spelling) S-e-e-d.

The Witness: Branch Manager of Buffalo.

Q. How long did he hold that position?

A. June 8th, 1929 to November 7th, 1936.

Q. And what position did Mr. Al. Schmitkin hold during the year 1938?

A. Branch Manager, Cincinnati.

Q. What was the period?

A. July 30th, 1934 to March 11th, 1939.

Q. What position did Mr. A. W. Smith, Jr., hold with the Company during the period from September, 1932 through [fol. 1572] March, 1936?

A. General Sales Manager in the East from January 24, 1932 to August 8th, 1936.

Q. And his territory as General Sales Manager of the East included the exchanges at Cincinnati, Cleveland, Albany, Buffalo and New York and Washington, did it?

A. Yes, sir.

Q. What position did Mr. R. S. Smith hold with the Company?

The Court: R. S.?

Mr. Wright: Yes.

The Court: Another one?

Mr. Wright: Yes, another Smith, R. S. Smith.

Q. What position did he hold with the Company during the period from August, 1933 through February, 1935?

A. Branch Manager, Albany, November 23rd, 1931 to November 12th, 1936.

Q. What position did Mr. H. G. Minsky hold with the company during the year 1939?

A. H. Minsky?

Q. Yes.

A. He is listed as a salesman in the Washington Branch June 7th, 1937 to September 3rd, 1938.

Q. The period I asked for was 1939, specifically March 1, 1939.

A. He was a salesman here in Buffalo September 6th, [fol. 1573] 1938 to August 2nd, 1941.

Q. And Mr. R. Struwe, what position did he hold on July 11, 1939 and in April, 1939?

A. A salesman, December 7th, 1936 to May 16th, 1942, in Albany, salesman in Albany, Albany Branch.

Q. Mr. H. M. Warner is the President of Warner Brothers Company?

A. That is correct.

Q. Do you know how long he has held that position?

A. As far back as I can remember.

Q. That would be more than 10 years?

A. Oh, yes, that is Warner Brothers Pictures, Inc.

Q. Did he hold any office in Vitagraph, Inc.?

A. I could not answer that correctly.

Q. Could you tell us what position Benjamin Kalmenson held with the company?

The Court: Spell the name.

Mr. Wright: (Spelling) K-a-l-m-e-n-s-o-n.

The Witness: He has here a number of positions; I don't know what particular periods.

Q. The time when he was General Sales Manager is what period?

A. October 27th, 1941 to date.

Q. And prior to October 27th, 1941, what was—what position did he have?

[fol. 1574] A. Western Sales Manager, December 19th, 1937 to October 25th, 1941.

Q. What was his position prior to October, 1937?

A. He also occupied another position in 1937; Eastern District Manager.

Q. During what period?

A. May 9th, 1937 to December 18th, 1937.

Q. What area was included in his district?

A. Buffalo, Albany, New York, New Haven, Boston. I think those are the branches.

Q. Would Cleveland be included?

A. I think that was called the Central District, and Mr. Kalmenson occupied that position in part of 1937, also.

Q. During what period was that?

A. He was the Central District Manager August 23rd, 1936 to May 8th, 1937, and those branches like Cincinnati and Cleveland would come under his supervision.

Q. Mr. Carl Lasserman was Assistant General Sales Manager from November 7th, 1936 to October 27th, 1941, was he?

A. That is correct.

Q. Now, as I understand it, you are not in a position, yourself, Mr. Doherty, to cover the duties of these gentlemen?

A. No, because I am in the accounting end of it, the auditing end of it, and that is controlled by the Sales Department.

[fol. 1575]

Mr. Wright: Would counsel be willing to stipulate that the duties of these men are in general the same as those of the men from other companies holding comparable positions?

The Court: Is that all for this witness?

Mr. Wright: No, we wish also to have him identify the license agreements produced pursuant to the subpoena.

Mr. McClennen: Well, if you will go ahead and finish up with this witness, we will consider what we can agree to.

Mr. Wright: All right.

The Court: Proceed.

Mr. Wright: Your Honor, counsel, or, Mr. Caskey, informs me the contracts are not ready so we can have a five-minutes —, perhaps, so that we can have them here?

The Court: All right. The court will stand in recess for five minutes.

(Short recess.)

[fol. 1576] By Mr. Wright:

Q. Have you there the license agreements that have been produced pursuant to the subpoena served upon Vitagraph, Inc., which was returnable on May 19, 1944, specifically those described in paragraph 2 of that subpoena, which calls for all license agreements for the exhibition in the following towns of feature pictures released during the periods indicated: Auburn, New York, Motion Picture Seasons, 1932-33 to 1935-36 inclusive, Norwich, New York, 1931-32 to 1937-38 inclusive; Amsterdam, New York, 1931-32 to 1936-37 inclusive; Little Falls, New York, 1931-32 to 1935-36 inclusive; Norwalk, Ohio, Period, January 1, 1934 to May 1, 1937; Van Wert, Ohio, January 1, 1934 to December 1, 1935; Fostoria, Ohio, January 1, 1934 to January 1, 1937; Medina, Ohio, January 1, 1937 to June 1, 1939; Tiffin, Ohio, January 1, 1936 to March 1, 1938; Corbin, Kentucky, August 1, 1938 to May 1, 1940; Paris, Kentucky, June 1, 1937 to June 1, 1940?

Do you have those in that folder marked Paragraph 2?

A. Yes, sir.

Mr. Wright: I will ask to have that marked for identification 635.

[fol. 1577] (The documents furnished in connection with Paragraph 2, subpoena returnable May 19, 1944, was marked as Plaintiff's Exhibit 635 for identification.)

Q. Do you have there all license agreements entered into between January 1, 1932, and September 1, 1937, which provide for the exhibition of feature pictures in the Strand

Theatre, Seneca Falls, New York? In this folder marked Paragraph 3?

A. Yes, sir.

Mr. Wright: I will ask to have that folder marked Exhibit 636 for identification.

(The folder containing documents furnished in connection with Paragraph 3 was marked as Plaintiff's Exhibit 636 for identification.)

Q. Have you there all license agreements entered into between June 1, 1931, and May 1, 1939, which provide for the exhibition of feature pictures in the Fox, State, Plaza, or Palace Theatres, Corning, New York, in folder marked Paragraph 4?

A. Yes, sir.

Mr. Wright: I will ask to have that marked Exhibit 637 for identification.

(The folder containing documents furnished in connection [fol. 1578] with Paragraph 4 was marked as Plaintiff's Exhibit 637 for identification.)

Q. Have you there all license agreements entered into between January 1, 1931, and September 1, 1936, which provide for the second-run exhibition of feature pictures in Lockport, New York, in the folder marked paragraph 5?

A. Yes, sir.

Mr. Wright: I will ask to have that marked for identification 638.

(The folder containing documents furnished in connection with paragraph 5 was marked as Plaintiff's Exhibit 638 for identification.)

Q. Have you all license agreements entered into between January 1, 1932, and January 1, 1939, which provide for the second-run exhibition of feature pictures in the Olympic, Strand, Liberty, Victoria or Palace Theatres, Watertown, New York, in this folder marked Paragraph 6?

A. Yes, sir.

Mr. Wright: I will ask to have that marked Exhibit 639 for identification.

[fol. 1579] (The folder containing documents furnished in connection with Paragraph 6 was marked as Plaintiff's Exhibit 639 for identification.)

Q. Do you have there all license agreements entered into between June 1, 1934, and July 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Ashland, Ohio, in the folder marked Paragraph 7?

A. Yes, sir.

Mr. Wright: I will ask to have that marked for identification 640.

(The folder containing documents furnished in connection with Paragraph 7 was marked as Plaintiff's Exhibit 640 for identification.)

Q. Do you have all license agreements entered into between May 1, 1935, and March 1, 1938, which provide for the exhibition of feature pictures in the Star Theatre, Delaware, Ohio?

A. We have been unable to lodate such documents.

Q. Do you have all applications made between June 1, 1935, and June 1, 1936, for license agreements providing for the exhibition in the Colonial or State theatres, Fostoria, Ohio, of feature pictures released by Vitagraph, Inc., during [fol. 1580] the 1936-37 and 1937-38 motion picture seasons? and

A. We have been unable to locate such documents.

Q. Do you have all license agreements entered into between June 1, 1936, and October 1, 1939, which provide for the exhibition of feature pictures in the Opera House, Lexington, Kentucky, in the folder marked Paragraph 10?

A. Yes, sir.

Mr. Wright: I will ask to have that marked Exhibit 641 for identification.

(The folder containing documents furnished in connection with paragraph 10 was marked as Plaintiff's Exhibit 641 for identification.)

Q. Do you have all license agreements entered into between August 1, 1937, and August 1, 1938, which provide for the second-run or subsequent-run exhibition of feature pictures in Corbin, Kentucky?

A. We have been unable to locate such documents.

Q. Do you have all license agreements entered into between June 1, 1938, and January 1, 1942, which provide for the second-run or subsequent-run exhibition of feature pictures in Harlan, Kentucky?

A. We have been unable to locate such documents.

Q. Do you have all license agreements for the exhibition [fol. 1581] of motion pictures in the following towns, entered into during the period indicated with respect to each town: Cumberland, Maryland, Motion Picture Seasons, 1935-36 through 1943-44; St. Michaels, Maryland, 1935-36 through 1940-41; Easton, Maryland, 1934-35 through 1940-41; Maysville, Kentucky, 1933-34 through 1940-41; Federalsburg, Maryland, 1934-35 through 1940-41; Hurlock, Maryland, 1934-35 through 1940-41; Harlan, Kentucky, 1935-36 through 1943-44; Salisbury, Maryland, 1934-35 through 1943-44; Richmond, Kentucky, 1934-35 through 1943-44; Paris, Kentucky, 1935-36 through 1939-40; Corbin, Kentucky, 1935-36 through 1943-44; Pikeville, Kentucky, 1933-34 through 1943-44; Lexington, Kentucky, 1936-37 through 1940-41; Middlesboro, Kentucky, 1935-36 through 1940-41?

A. Yes, sir.

Q. Those are contained in this folder marked Paragraph 19?

A. Yes, sir.

Mr. Wright: I will ask to have that folder marked as Exhibit 642 for identification.

[fol. 1582] (The folder containing documents furnished in connection with Paragraph 19 was marked as Plaintiff's Exhibit 642 for identification.)

Q. Do you have there the documents produced in response to the subpoena served on Warner Bros., Inc., returnable June 3, 1944, which calls for all license agreements for motion pictures entered into between January 1, 1935, to September 1, 1940, with Ralph T. Kemper, Halmer D. Schreffler, Tom Gregory, Louise Stoll (Mrs. Francis D. Reeh), Belpik Theatre Corporation, Schine Shelby Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Castamba, State and Opera House theatres in Shelby, Ohio?

A. Yes, sir.

Q. Those are in this folder you just handed me?

A. Yes, sir.

Mr. Wright: I will ask to have that marked Exhibit 643 for identification.

(The folder containing documents furnished in connection with subpoena served on Warner Bros., Inc., returnable June 3, 1944, was marked as Plaintiff's Exhibit 643.)

[fol. 1583] Q. Do you have all license agreements for motion pictures entered into between January 1, 1933, and September 1, 1938, with Arthur J. Buck, Ural Buck, C. Kahn, Ted Vermos, Belpik Theatre Corporation, Civic Theatres, Inc., Fostoria Theatres Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Civic, Roxy, State and Colonial theatres in Fostoria, Ohio?

A. We are unable to locate such documents.

Q. Your answer is the same with respect to all license agreements for motion pictures entered into between January 1, 1936, and September 1, 1940, with P. E. Essick, Myer Fine, Medina Temple Theatre Co., Medina-Princess Corporation, Medina Amusement Co., Schine Medina Corporation, Schine Chain Theatres, Inc., Schine Enterprises Corporation, Schine Circuit, and Schine Theatrical Co., Inc., which provide for the exhibition of motion pictures in the Medina Temple and Princess theatres at Medina, Ohio? I take the answer to that is yes?

A. I will make the same answer, that we are unable to locate any such documents.

Q. Have you there the documents produced in response to subpoena served on Warner Bros., Inc., returnable [fol. 1584] August 15, 1944, calling for all franchises and master agreements made between you and Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises, Schine Lexington Corporation, Belpik Theatres, Inc., or Chesapeake Theatres Corporation, for the exhibition of feature films released by you during one or more of the motion picture seasons 1931-32 to 1940-41, inclusive?

A. Yes, sir.

Q. Those are contained in this folder marked Paragraph 1?

A. That is right.

Mr. Wright: I will ask to have that marked Exhibit 644 for identification.

(The folder containing documents furnished in connection with Paragraph 1, subpoena of August 15, 1944, was marked as Plaintiff's Exhibit 644 for identification.)

Q. Do you have there all printed schedules of feature motion picture films released by you during the period from August 1, 1931, to September 1, 1941?

A. Yes, sir.

Q. And those are contained in this folder marked Paragraph 3?

A. Yes, sir.

[fol. 1585] Mr. Wright: I will have that marked Exhibit 645 for identification.

(The folder containing documents furnished in connection with Paragraph 3 was marked as Plaintiff's Exhibit 645 for identification.)

Mr. Wright: That is all.

Mr. McClennen: If your Honor please, Mr. Wright has asked us to agree—and we do—that if a competent witness from Warner's were called he would testify that the respective duties of the different employees were substantially as stated by Mr. Zimmerman and Mr. Saunders with respect to their company corresponding positions.

The Court: You say if he were called?

Mr. McClennen: Well, I will put it that such a witness may be taken to have so testified.

Mr. Wright: That is agreeable to us, if your Honor please. It has been called to my attention that these documents that I handed Mr. Saunders while he was on the stand this afternoon, the three which had previously been identified, the one which has been identified as Exhibit 58, a reply had [fol. 1586] been identified at the same time by the defendants, so that I take it there is no dispute that this letter identified as Exhibit 58 was received by Mr. Rodgers. That is all I wanted to establish. If that is agreed Mr. Saunders need not concern himself with that any further.

Mr. McClennen: It is conceded that the original of Exhibit 58 was received by Mr. Rodgers. We cannot concede that it came from Loew's files, in view of the testimony, as distinct from Mr. Rodgers' personal file.

The Court: What was Mr. Rodgers' position?

Mr. Wright: He was the general sales manager at that time.

Mr. McClennen: Mr. Rodgers was the general sales manager at that time. And of course we persist in the objection to its admissibility.

Mr. Wright: It has not yet been offered.

Mr. Rogers: We wish to preserve it though.

Mr. Wright: My attention has also been called to the fact that the letters which I questioned Mr. Saunders about, which were previously identified as Plaintiff's Exhibits 2 and 13, respectively, had been received in evidence subject [fol. 1587] to connection. The only connection I sought to make here was, of course, in addition to establishing who the people were who were mentioned here, the fact that they came from the files of the Loew Company, and as I understand it there is no dispute about that either.

Mr. McClennen: It is conceded that the original of Exhibits 2 and 13 came from the files of the Loew Company, we persisting in our contention that that is not adequate connection to render them admissible and we still persist in the objection to their admission.

Before we close this afternoon I would recall to your Honor's recollection a conference we had on Monday, at which you spoke of the desirability of our making certain further stipulations of admissions. Pursuant to that I now hand to Mr. Wright a stipulation showing the theatres which are operated by the several operating companies set forth in answer 15 to the interrogatories. That is handed [fol. 1588] him in duplicate. Also a stipulation as to the way in which the prints were served for Virginia, Delaware, Maryland and Kentucky, those for Ohio and New York having already been covered by the answer to the notice to admit. That also I hand Mr. Wright in duplicate. Also I hand him in duplicate a stipulation as to the operation of certain theatres in the period prior to their acquisition by the defendants or at the time when the defendants began to operate in the towns.

Mr. Wright: I should not think there should be any difficulty about the form of the stipulation on the towns in the service of prints. As to the operating companies of the theatres, of course we do not have any knowledge as to which they operated, except as supplied by the defendants, and we might perhaps change the form of the stipulation simply to change the testimony of someone who would so furnish that information.

Mr. McClennen: You don't mean change the form of the

stipulation but you may want to show something otherwise? [fol. 1589] But that is the form that the stipulation will be.

Mr. Wright: We, of course, will want to look them over. There may be some changes in form.

Mr. McClennen: I didn't mean to insist that you should put them in now. I am handing them to you so that I have fully performed my obligations to the Court, undertaken last Monday, as soon as I had an opportunity to check the facts.

Mr. Wright: I did hope that we would be able to complete today the identification of the material produced in response to the Schine subpoena.

Mr. McClennen: That could not be done in seven minutes.

Mr. Wright: Specifically can we complete the one calling for the agreements made with the various operating companies with persons whose theatres have been taken over, particularly Medina, Ohio? We are going to present that situation on Monday and that is why we would like to have that data.

Mr. McClellen: We cannot complete that. Mr. McKay thought that he had a copy in his office and he will investigate on his return to New York.

[fol. 1590] Mr. Wright: What would be the earliest the copy could be made available to us?

Mr. McKay: Monday morning.

Mr. Wright: It will be available Monday morning, then?

Mr. McClennen: Yes.

Mr. Wright: Now, if the Court please, the Universal and United Artists representatives have not yet identified their license agreements and the Columbia representative was not able to get here until next week. However, rather than interrupt the witnesses we have already arranged to have in the early part of the week, I would prefer to let that identification go over until the end of the week, if that is agreeable.

The Court: Can't you stipulate to any of those exhibits here? Now that you have got them here, perhaps we can have a stipulation.

Mr. McClennen: If we could have those files handed over to us I dare say we would be willing to stipulate that these witnesses here are to be taken to have testified to them.

The Court: You want to see what they are?

Mr. McClennen: I want to see what they are, without giving any assurance.

[fols. 1591-1596] The Court: I thought it could be covered in that way. They are file papers and if there isn't any dispute about that, we might be able to have on Monday morning a stipulation.

Mr. Wright: As soon as we can get it typed up, we can supply a list of documents contained in the folders that will be identified, and maybe we can stipulate it.

Mr. McClennen: If you will just let me have the list, as soon as you have it, and the documents in the folders, I can check and see if we can agree to it.

The Court: This case is adjourned until 2 o'clock next Monday, but the Court is adjourned until 10 o'clock.

(Whereupon, an adjournment was taken until Monday October 2nd, 1944, at 2 o'clock P. M.)

[fol. 1597] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAINS THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 2nd, 1944, at 2 o'clock P.M.

Appearances: Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States. Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for Defendants.

[fol. 1598] PROCEEDINGS

Mr. Wright: I will call Mr. Gutilla.

DANIEL GUTILLA, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Wright:

Q. Where do you live, Mr. Gutilla?
A. Bellefontaine, Ohio.
Q. You own the Strand Theatre there?
A. Yes, sir.
Q. How long have you owned it?
A. Since 1916.
Q. You operate it as a theatre, yourself, then?
A. Yes, sir.
Q. Until what time?
A. Until 1924.
Q. Then it was sold?
A. I sold that to Mooney.
Q. Mr. Milton Mooney?
A. Milton Mooney.
Q. That is, you sold the lease on the theatre?
A. I sold the equipment and I gave him a lease on the theatre.

[fol. 1599] The Court: 1934 did you say?
The Witness: 1924.

By Mr. Wright:

Q. That was a 10-year lease, was it?
A. Yes, sir.
Q. Then do you recall when Mr. Mooney sold out to the Schine interests?
A. I recall it was in July, June—June 1st, 1931.
Q. June of 1931?
A. 1931.
Q. The lease on the Strand was then assigned to Schine?
A. To Schine, yes.
Q. Then did you make another lease on the Strand with Schine when it expired in 1934?
A. I have not leased it, the Grand Opera House.

Q. I don't think you understood my question. I am still talking about the Strand. I said when the strand lease expired in 1934, did you make another lease on the Strand to the Schine people?

A. To Schine, yes.

The Court: Did you have the right of renewal? You sold your lease to Mooney, did you say?

Mr. Wright: He was the owner of the building. He sold his equipment and gave Mooney a ten-year lease and [fol. 1600] Mooney assigned to Schine in 1931. (To reporter) Would you read the last question and answer?

(Preceding question and answer read.)

The Witness: 1934.

Q. How long was that lease for?

A. For two years.

Q. That expired?

A. In 1936.

Q. In the summer of 1936?

A. Yes, sir.

Q. Then did you make another lease on it?

A. 1936 to '38.

Q. During that four-year period, from 1934 to 1938, did Schine operate the theatre?

A. The Strand?

Q. Yes.

A. He operated the Theatre for a while some time.

Q. Do you know how much of the year it was open and how much of the year it was closed during those four years?

A. I don't recall. I don't remember exactly, but some time they opened and some time not.

Q. Was it closed most of the time, or was it open most of the time?

A. It was closed on the lease and it was not closed on the lease, it was open and closed.

[fol. 1601] Q. Can you tell us whether, during the period from 1934 to 1938, it was open most of the time or was it closed most of that time?

A. Most of the time closed.

Q. You can't say about how many weeks during the year it was open or whether it was open at all during some of those years?

A. I can't say.

Q. You don't remember?
A. I don't remember.
Q. Did you bring with you—you were served with a subpoena duces tecum, were you not, in this case, or a subpoena asking you to bring certain documents?

The Court: Papers.
The Witness: I ain't got no papers.

Q. You have leases?
A. I have the lease.
Q. You have a lease you made in——
A. 1938.
Q. 1938?
A. And 1940. This is 1938 (document handed to Mr. Wright by the witness).

Mr. Wright: We will ask to have this lease that the witness has produced, dated April 30th, 1938, signed by Mr. [fol. 1602] Gutilla and by Mr. May, on behalf of Schine Theatrical Co., Inc., as the next plaintiff's exhibit for identification.

(Thereupon lease from Gutilla to Schine, dated April 30th, 1938, referred to, marked Plaintiff's Exhibit No. 646 for identification.)

By Mr. Wright:

Q. This lease marked as Exhibit No. 646 for identification, that you just handed me, that covers the Strand Theatre?
A. Yes, sir.

Mr. McClennen: If your Honor please, we just note the objection as to others, that this is a purely local transaction.
The Court: Yes, I understand.
Mr. Wright: We will offer the lease in evidence.
The Court: What period does it cover?
Mr. Wright: This covers a two-year period from 1938 to 1940.
Mr. McClennen: Our objection is as stated; only on that ground.
The Court: Yes.

(Thereupon the document previously marked as Plaintiff's Exhibit No. 646 for identification received in evidence and marked as Plaintiff's Exhibit No. 646.)

[fol. 1603] By Mr. Wright:

Q. I call your attention to a paragraph on Page 2 "It is further agreed by and between the parties that lessee will operate said theatre at least once a week for 14 weeks during each year of the operation of this lease".

Can you tell us what the occasion for having that provision in the lease was?

Mr. McClennen: That is objected to, that calls purely for a conclusion and also it is wholly immaterial. This is the contract that was made.

Mr. Wright: Will your Honor rule?

The Court: Well, you seek to vary the terms of the document?

Mr. Wright: I simply want to show the circumstances leading up to it. Perhaps we can get at it this way:

Q. Whom did you negotiate that lease with, who represented Schine?

A. It was Mr. May.

Q. Mr. May?

A. Mr. May or Mr. Lazar, one of them two, I don't remember sure. It was 1938. I don't remember whether it was Mr. May or Mr. Lazar. It was 1936 when Mr. May was there.

Q. I am talking now about that lease signed in 1938; that [fol. 1604] is what I mean?

A. Yes.

Q. This one?

A. Yes.

Q. Do you remember whom you negotiated that with?

A. I think in 1938——

Q. Maybe the signatures on it will help you.

A. Well, here it is signed by Mr. May, too, but I don't remember whether it was Mr. Lazar at the time.

Q. You might have negotiated it with Mr. Lazar, then, or with Mr. May?

A. One of the two. I don't remember for sure which one it was at that time.

Q. Before the lease was executed did you have any conversation with them with respect to the operation of the theatre?

Mr. McClennen: This is objected to as immaterial. This is the lease that was made. This is the contract that was

made, and if there was anything that was restrictive in any way in this contract the contract speaks for itself as to what that was. The conversations that led up to it we submit are not material, relate purely to a local and per-
[fol. 1605] sonal transaction, and have no bearing on any matter of interstate commerce. The lease tells the story.

The Court: Of course if the defendants contradict the instrument it may not be competent. If they do not it seems to me it would be competent under the complaint made here. I overrule your objection on the other ground, on the question of it not being an interstate transaction, also. Objection overruled.

(Last question read.)

The Court: That calls for a yes or no answer.

By Mr. Wright:

Q. That is with Mr. May or Mr. Lazar.

A. I think it was Mr. Lazar. I think I remember it was him.

Q. Did you have any conversation with him about the operation of the theatre before you made the lease?

A. Yes, the conversation I have with Mr. Lazar is about the price, the rent, how much it will be.

Mr. McClennen: Just a moment. All he was asked was whether he had a conversation on the subject.

The Court: Yes or no would answer that question. Did you have a conversation?

A. Yes, a conversation about the rent, how much they pay
[fol. 1606] for the rent.

Q. The question I asked you was whether you had any conversation with them with reference to the operation of the theatre, whether to keep it closed or to open it?

A. On the lease they have got to open it 14 weeks in the year, not less than once a week.

Q. Can you tell us what the conversation you had was which led up to that provision?

Mr. McClennen: That is objected to.

Q. What was said about opening the theatre or keeping it closed?

The Court: What did you say to him and what did he say to you, to the best of your recollection?

A. Well, he says, "They are going to keep it open for 14 weeks".

By Mr. Wright:

Q. What did you say?

A. I can't say "No", because it is in the lease. I says for him to open it 14 weeks. I don't know whether he opened it or not. It was opened in September for 14 weeks. I remember that.

Q. That was after you made the lease?

A. After we made the lease.

Q. Do you remember whether it had been open for 14 weeks during the year 1937?

[fol. 1607] A. 1937?

Q. Yes.

A. No. Well, before 1938 they didn't open it yet. They keep it closed, before 1938.

Q. It had been closed?

A. It had been closed most of the time.

Q. Had it been open as much as 14 weeks during the year 1937?

A. No.

Mr. McClennen: Just a moment——

The Court: Let the witness state.

Q. What is the best estimate you can give us to the number of weeks the theatre was open during the year 1937?

Mr. McClennen: Just a moment. That is not the subject for estimate. If the witness can tell when it was open and when it was closed, subject to the general objection, all right.

The Court: He may not be able to state specifically.

Mr. McClennen: The estimate is a specific objection in addition to the others.

By the Court:

Q. What is your recollection of the amount of time the theatre was closed during the year 1937? How much was it closed during 1937?

A. It was closed—open probably 14 weeks in the year, two times a week.

[fol. 1608] The Court: I am talking about 1937 before you made the 1938 lease.

Mr. Wright: We are talking about the year before you made the lease.

The Witness: I didn't open it.

By the Court:

Q. It was not open at all?

A. It was not open. From 1936 to 1937 you mean to 1938?

Mr. Wright: Yes, 1936-1938.

The Witness: It was not open. It was closed.

By the Court:

Q. Do you mean all during 1936 and 1937?

A. Yes, during 1936 and 1937.

Q. Closed all the time?

A. Yes.

By Mr. Wright:

Q. Did you also bring with you the lease that you made in 1940?

A. Yes, sir.

Q. That is this lease dated July 1, 1940, which is signed by you and Schine Theatrical Company by Mr. Selisner?

A. Yes, sir.

Mr. Wright: I will ask to have that marked with the next number for identification.

Mr. McClennen: We make the same objection as we made [fol. 1609] to the other lease.

(The lease dated July 1, 1940, was marked Plaintiff's Exhibit 647 for identification.)

Q. I call your attention to the fact that the 1938 lease expired on June 1, 1940, and the 1940 lease, Exhibit 647 for identification, began on July 1, 1940. Did you have negotiations with reference to that 1940 lease during that intervening time there?

A. Yes, sir.

Q. Who did you have those negotiations with?

A. With Mr. Lazar.

Q. Whereabouts?

A. We tried to get together on the rent.

Q. I don't think you understood the question. I said, where.

A. In Bellefontaine, Ohio, at the Holland Theatre.

Q. That was the Schine Theatre there?

A. The Schine Theatre.

Q. In those conversations you had with Mr. Lazar what, if anything, was said about the operation of the theatre?

Mr. McClennen: We make the same objection as to the similar conversation as to the other lease.

The Court: Overruled.

A. We had a conversation to open the theatre for 14 weeks. I wanted it for 26 weeks but they don't want to [fol. 1610] agree and we make it 14, the same as the one in 1938 and 1940.

Q. You said you wanted them to keep it open for 25 weeks?

A. For 26 weeks, but they don't want to open it for 26 weeks.

Q. Was anything said in the course of those conversations about the operation of the theatre by anybody else, anyone other than Schine?

A. Some other theatre? Operation of the theatre, you mean?

Q. Was anything said about anybody besides Schine operating the Strand Theatre?

A. Besides Schine? I don't understand.

The Court: About any other person operating the Strand Theatre except Schine.

A. No, nobody else.

By Mr. Wright:

Q. Was anything said about your operating the theatre?

A. When we were talking before signing the lease?

Q. Yes. I am talking about the conversation you had with Mr. Lazar.

A. We tried to get together and tried to operate—my son Jack, he wants the theatre.

Q. What did you say about your son operating it?

A. I told him if we can get together in some way about letting my boy open the theatre, my son and I.

Q. What is your boy's name?

A. Jack.

[fol. 1611] Mr. McClennen: Perhaps I should have noted ahead the general objection that we have already made to this question.

Mr. Wright: I think it can be understood that you have that objection to all of this.

The Court: Let the witness go ahead and state the conversation. What was the last answer there?

A. My boy's name is Jack.

By Mr. Wright:

Q. Was he operating another theatre then?

A. A small theatre about eleven miles from Bellefontaine.

Q. Where?

A. DeGraff, Ohio.

Q. Go ahead and tell us what was said in the conversation?

Mr. McClennen: This is a conversation with Mr. Lazar?

Mr. Wright: Yes.

Mr. McClennen: At the time for the negotiation of this lease?

Mr. Wright: Yes, before the 1940 lease was made.

Mr. McClennen: We have these objections and the further objection that it is not within any complaint specified here.

The Court: About this particular theatre——

Mr. Wright: I am sure Bellefontaine was mentioned in the complaint. Of course we have not undertaken to set forth in the complaint the particular testimony that would [fol. 1612] come from the witness.

The Court: Was he listed as a witness in the answer to the interrogatories?

Mr. Wright: As I recall, Mr. Gutilla was listed as a possible witness, in the answer to the interrogatories. I do not think there is any objection on that ground.

Mr. McClennen: The witness listed to us was Theodore Gutilla, and not this witness.

By Mr. Wright:

Q. What is your first name?

A. Daniel.

Mr. Rogers: Theodore is listed to us.

By Mr. Wright:

Q. Who is Theodore Gutilla?

A. I don't know.

Mr. Wright: Apparently that was a mistake made in the first name. If there is any claim of surprise he can be recalled for further cross-examination. If Counsel is not prepared to cross-examine him let him so state.

Mr. McClennen: There is not any claim of surprise. It was stated that this witness had been listed as a witness for us and I merely call attention to the fact that he had [fol. 1613] not been listed as a witness, in the interest of accuracy.

Mr. Rogers: Theodore Gutilla, Bellefontaine, Ohio, is the one who is listed with us.

The Court: My question was whether in your interrogatories you refer to that situation?

Mr. Wright: I recall that we covered the Bellefontaine situation. We referred to Bellefontaine. Whether we referred to the Strand Theatre or not I am not sure. If it is a question of amending the pleadings, we can do that, I suppose, at the end of the case. Will you read the last question?

(Last question read.)

By Mr. Wright:

Q. This was the conversation you had with Mr. Lazar?

A. The conversation was before we signed the lease, or tried to sign the lease, and I told Mr. Lazar that if we can't get together I am going to open my theatre.

Q. You said if you can't get together you were going to open your theatre?

A. I was going to open my theatre with my son, that my son wants very badly to open the theatre.

Q. What did he say?

[fol. 1614] A. Mr. Lazar says, "How can we get good films, good pictures?" I told him, I says, "We can get some pictures on the second-run. After they run at the Schine Theatre we are going to run them at the Strand."

[fol. 1615] Q. Run pictures at the Strand second-run after first-run at the Schine Theatre in Bellefontaine?

A. Yes, sir.

Q. What did he say?

A. Mr. Lazar says Mr. Schine says he going to open a second-run theatre to make good for second-run.

Q. What did you say to that?

A. I says "Well, all right, you got plenty of pictures, if you going to have a second-run, you got to play second-run." He said "We going to play at the Opera House second-run."

Q. What was the Opera House?

A. Opera House was, Mr. Schine had a lease on it.

Q. That is another theatre in Bellefontaine?

A. That is another theatre in Bellefontaine.

Q. Was that closed then?

A. It was closed, yes, sir.

Q. Do you know how long that had been closed?

A. Oh, that had been closed after Mr. Mooney's lease, sold the lease to Schine, the Strand Theatre lease, the Opera House was included in the lease.

Q. Do you know how many years before 1940 the Opera House been closed?

A. It had been closed all the time except 1934 to '36—let's see—yes, it was 1932 to '34.

[fol. 1616] Q. You mean it had been closed from 1934 to 1940?

A. From 1932 to 1934 it had been open about six or seven months with different people.

Q. That is during——

A. With four managers.

Q. From 1934 to 1940——

A. From 1934 to 1940.

Q. —continuing) it was then closed during that period?

A. Yes, sir.

Q. Do you know whether it is still closed?

A. Still closed, yes, sir.

Q. Hasn't been open since then?

A. No, hasn't been opened since.

Q. Then after the conversation with Mr. Lazar did you sign the lease then or make it later or sign it later; how much time elapsed there before you signed this?

A. Take a month.

Q. Lease marked 647 for identification?

A. Yes.

Q. Did you sign that in Bellefontaine?

A. No, I signed this in Gloversville.

Q. You went down to Gloversville?

A. Yes, sir.

Q. How long after this conversation with Lazar was that?

A. It was before we went to Gloversville, about four [fol. 1617] weeks. We was talking all the time about this lease.

Q. And you went to Gloversville?

A. And we decided to go to Gloversville to see Mr. Schine.

Q. Then you had the final negotiations with Mr. Schine?

A. Yes, sir.

Q. The lease was signed there on what date?

A. Well, it is July 1st, I guess it is signed, yes, July 1st.

Mr. Wright: We will offer this.

The Court: What is the date?

The Witness: The lease was made on July 1st, and then I took the lease, before I signed, Mr. Schine and all signed except me. I take it back to Bellefontaine to show to my lawyer.

Q. Then you took it back and signed it after July 1st?

A. Yes, then I signed in Bellefontaine and gave it to Mr. Lazar after I signed in Bellefontaine.

Mr. Wright: We will offer this.

Mr. McClennen: The same objection as to the prior lease.

The Court: Same ruling.

(Thereupon the document previously marked as Plaintiff's Exhibit No. 647 for identification was received in evidence.)

By Mr. Wright:

Q. Mr. Gutilla, you lived—how long have you lived in Bellefontaine?

[fol. 1618] A. How long what?

Q. How long have you lived in Bellefontaine?

A. How long I live in Bellefontaine?

Q. Yes.

A. Since 1913.

Q. You were there during the period from 1932 to '34, when you say the Opera House was operating?

A. Yes, sir.

Q. Do you know what admission prices that the Schines were charging at their Holland Theatre there at that time?

A. Well, I don't remember exactly. I know there was a

change, 25 and 35, 25 matinee and 35 night, and sometime dropped. I don't remember. I don't know what it was. I see price of matinee 15 cents and 25 cents at night.

Q. Do you remember when that drop occurred there in that period?

A. I don't remember just exactly the months.

Q. Was it during the period that the Opera House was open?

A. It must be.

Q. Then do you recall what the prices were there after the Opera House closed?

A. 25 cents matinee and 35 cents nights.

Mr. Wright: You may cross-examine.

Mr. Rogers: Your Honor, in view of the circumstances, may I ask your Honor to please permit us to take this posi-
[fol. 1619] tion, that for the time being, we have no cross-examination of Mr. Gutilla, but that he stand by pending the examination of Mr. Mooney?

Mr. Wright: I don't see any reason why he shouldn't be cross-examined now.

Mr. Rogers: Well, in a measure there was a surprise here because he was not listed as a witness. Theodore was listed as a witness. There are two Gutillas. There is the father and the son. Apparently there is no Theodore, and we were utterly confused, we didn't know whether the father was going to be produced or the son was going to be produced. We find that Theodore is just a myth.

The Court: Were you surprised?

Mr. Rogers: Yes, I was, frankly, very much so. I don't see that any harm can be done. My position is that I am not prepared to cross-examine Mr. Gutilla at this time.

Mr. Wright: If the Court please—have you got that letter we wrote ten days ago?

Mr. Rogers: I have your letter right here.

Mr. Wright: There is only one Mr. Gutilla with whom these people have done business.

[fol. 1620] The Court: I am not concerned with that.

Mr. Rogers: Here is your letter, Mr. Wright, and your letter says "Theodore Gutilla." I was under the impression he meant the son all the time.

The Court: If you were taken by surprise that does not enter into the question of withdrawing the witness from the stand. If you are taken by surprise, it is a different

thing. No, go on and cross-examine, and if you want Mr. Mooney to step out of the room, he may.

Mr. Rogers: My position then is, if the Court please, that I prefer not to proceed with the cross-examination of this witness.

The Court: No cross-examination? That is all, Mr. Gutilla.

Milton A. Mooney called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Mooney?

[fol. 1621] A. Cleveland, Ohio.

Q. What is your occupation?

A. I am President and General Manager of Co-operative Theatres of Ohio, Inc.

Q. How long have you held that position?

A. Going on my 7th year.

Q. What was your occupation before that?

A. I was Branch Manager of Warner Brothers Pictures.

Q. Where?

A. Cleveland, Ohio. I would like to correct that. It was Vitagraph, Inc., at that time.

Q. That is the wholly owned subsidiary?

A. That is right.

Q. And then before you were Manager of Vitagraph at Cleveland, what did you do?

A. I was a salesman for the same company.

Q. In what territory?

A. I covered all the different territories in northern Ohio at different intervals.

Q. That is, that were served out of Cleveland?

A. Yes, sir.

Q. For how long?

A. For a period of 19 years.

Q. You were formerly engaged in the operation of theatres at Bellefontaine, Ohio?

[fol. 1622] A. Yes, sir.

Q. That was during what period?

A. From 1924 to 1931.

Q. And calling your attention—strike that out. What were the names of the theatres you operated there?

A. The Strand, Opera House and Majestic.

Q. Those were the theatres you bought from Mr. Gutilla?

A. Yes, sir.

Q. Calling your attention to the year 1930, were there any other theatres in operation in Bellefontaine other than yours?

A. No, sir.

Q. Do you recall whether construction was started on any then?

A. Yes, they started construction of the Holland Theatre.

Q. Who did?

A. Mr. Schine.

Q. And when was that?

A. In the fall of 1936. I mean, of—the fall of 1930, rather.

Q. Do you recall when that theatre was opened?

A. Some time in February, 1931.

Q. And do you recall what major product you were exhibiting at your theatres in Bellefontaine for the 1930-31 season?

A. We had Fox, First National, Paramount and F.B.O.

[fol. 1623] The Court: What is that?

The Witness: F.B.O.

The Court: What does that mean?

The Witness: It is the name of a film company at that time. It is now R.K.O. and Metro. For 1930-31 we didn't have Metro. We had Metro up to that time.

Q. How long had you been using Metro?

A. For a period of years we had the theatre, six years.

Q. What if any efforts did you make to license Metro features for the 1930-31 season?

A. I talked with Mr. Eddie Booth, who was branch manager of Metro at that time, in an endeavor to buy the pictures.

Q. Whereabouts?

A. At a convention in Columbus and also over the telephone.

Q. Eddie Booth was Branch Manager where?

A. Metro-Goldwyn-Mayer, Cincinnati, Ohio.

Q. And Bellefontaine was served out of Cincinnati?

A. Yes, sir.
Q. What was the conversation you had with Mr. Booth?

Mr. McClennen: That is objected to, if your Honor please. This raises a question that is new in the case since the hearings before your Honor and the trial before your Honor in June, in this respect: At that time assurances [fol. 1624] were given of the connection that was going to be made by showing the authority of a Branch Manager to speak for the corporation. That has passed by now, because there has been put in the evidence that shows with precision the authority which the Branch Manager did not have with respect to his company and there has also been brought to the attention of the Court the matter in the grey covered brief handed your Honor, the grey covered memorandum with respect to the precise statement of the Supreme Court of the United States on that subject, a matter which was not before your Honor at that time; also the ruling of other courts recently made on this subject. That presents here the three grounds on which this type of testimony is not admissible: (1) is that it is distinctly stated by the Supreme Court that where the conversation is with the alleged conspirator that the testimony should not be admitted until there is evidence in other ways of the existence of the conspiracy. I have just paraphrased it and it [fol. 1625] is important enough so that I read it instead. This is at the foot of page 8 of the grey covered memorandum. The Supreme Court of the United States there said:

"Declarations are admissible over the objection of an alleged co-conspirator who was not present when they were made only if there is proof alia unde that he is connected with the conspiracy, otherwise, hearsay would lift itself by its own boot straps to the level of competent evidence."

There are the three things required that must be met in order that a conversation of this kind may be shown in evidence. Before stating those three things, let me interject that in many of these cases this matter is not presented as a ground for total exclusion because the alleged co-conspirator is made a party defendant. In that case within the discretion of the Court a situation may arise where the particular piece of testimony may be shown for the limited purpose of its bearing on that particular defendant. Here we are not met with any such situation because the alleged

[fol. 1626] co-conspirator is not a party. The sole question is whether this testimony is admissible in a case in which the only defendant is what I will call, for shortness, the Schine defendants.

Now, in such a case as that, these preliminaries must be met, these preliminary requirements must be met before the evidence is admissible at all. First, evidence to establish the existence of the conspiracy; second, the scope of that conspiracy sufficiently to show that this conversation that is offered is a step within the scope of that conspiracy, that is in the course of carrying out that conspiracy during the continued existence of that conspiracy. Those two must be met before the declaration of the corporation could be admitted, the conversation of the corporation could be admitted in evidence against the Schine defendants, in this particular case, the Vitagraph Corporation.

The next requirement is that the conversation shall be the conversation of Vitagraph, the corporation, in the sense [fol. 1627] that it is a conversation, that the declaration made is a declaration made for that corporation by an official authorized to make such a declaration that is now offered. The declaration that is now offered is a declaration of a branch manager. It has appeared that the branch manager of Warner's,—I am sorry, I have said Warner's, because I had overlooked that this is Metro, and Mr. Rogers has corrected me. The testimony of Mr. Saunders is precise, unequivocal that the branch managers of Metro have no authority to make a declaration of this kind. They are not empowered to tell an applicant who has the pictures. They are not empowered to describe the policy, the selling policy of the company. They are empowered only to receive the applications and, in so far as the Company is concerned, make their recommendations and forward the application to headquarters. Of course, I am not speaking about their authority to engage stenographers and tend to the booking of pictures and those things, but so far as the selling of pictures is concerned, there is no authority to go beyond that.

[fol. 1628] Therefore I submit that this testimony should not be received because there is no evidence here that Metro had conspired with the Schine defendants at the time in question, or, indeed, at any time; that there is no evidence that the scope of that conspiracy, had it existed, was broad

enough to make the action of a branch manager of Metro, in respect to the sale of pictures and the policy of Metro with respect thereto, an act in pursuance of the conspiracy or within the confines of the scope of that conspiracy; and, third, that it has been clearly established that even if Metro could do this as a part of the conspiracy that it has been clearly established that the branch manager could not speak for Metro in that respect. The conspiracy, if it had existed, was not a conspiracy in Cleveland, or contemplating action in Cleveland—I hope I have got the right city here that the witness was going to speak about.

Mr. Rogers: Cincinnati.

Mr. McClennen: It is suggested that it was Cincinnati, [fol. 1629] and if that is the fact it is equally true of Cincinnati.

Therefore, for these three reasons, the testimony should not be received.

We are now at the outset of what, struggle as best we may, is going to be a long trial. Conversations of this kind, if admitted, involve an extensive cross-examination into the conversation that is testified to. It involves the calling of other witnesses to that conversation, to meet it in the respects in which it is not conceded to be accurate, full, complete or existent at all. Therefore, as a matter of the administration of the case we strongly urge upon your Honor that such testimony should not be received.

If it were a discretionary matter we appeal for the exercise of that discretion for the exclusion of the testimony, but we urge that it is not within the discretionary powers of the Court, because of the rules of law which I urge exist by the determination of the Supreme Court, namely, there is no evidence now before the Court that there was a con- [fol. 1630] spiracy. On that ground a conversation with a stranger to the Schine defendants should not be admitted. There is no evidence that if there were a conspiracy the scope of it was such that this conversation would be a step in the carrying out of any such conspiracy which did not contemplate any action of the kind in either Cincinnati or in Cleveland, and, thirdly, that it has now been positively shown that the branch manager had no authority to make such a declaration for Metro. Therefore, I urge that this question should not be admitted and that, interchangeably with what I have just said, the same ruling be made here-

after with respect to conversations of other branch managers of concerns that are not parties to this suit.

I thank your Honor for hearing me so patiently and so long, but it is a very important step in the case.

Mr. Wright: If the Court please, I think all of these questions were ruled upon back in May. We proceeded then [fol. 1631] on the assumption that we had a course of business to prove here and the only way that we can prove it is by showing what was done in the course of the business between the independent exhibitors and these major distributors, and what was done between the major distributors and Schine. We have proceeded on that theory. The only connecting up, the only reason we offer the testimony as to who these people were, was to shorten up and avoid the objection that was frequently made before, that there was no proof that the parties with whom these conversations were held did have an official position such as the witness described. That has been cleared out of the way and there is no occasion here to stop and consider before the witness even answers whether or not what he is testifying, the conversation, or what Booth told him, was within or outside of some special or general knowledge that Booth might have had from Metro. Nobody contends that Mr. Booth did not have authority to talk to the exhibitors in his territory, of which Mr. Mooney is one, and all that he [fol. 1632] has been asked to do is give his conversation with Mr. Booth. I submit that nothing that has been said by Mr. McClennen is any basis for refusing the witness permission to answer this question.

Mr. McClennen: The matter before the Court before was more than just the question of whether the branch manager, or the person spoken of was a branch manager. The question before the Court before, to which the assurance of connection later was made, was the question of whether this was an authorized representative in this respect of the particular distributor.

Mr. Wright: Do you contend that Mr. Booth was not authorized——

Mr. McClennen: Just a moment. I can best make my contention clear by stating it to the Court. As I was saying, I contend that Mr. Booth, if that be the man we are speaking about, I contend that no branch manager with any of these companies was authorized by his company to inform a prospective customer that it was the policy of the company

to sell to Schine instead of to him. That branch manager [fol. 1633] does not make the policy and could have only hearsay evidence of what the policy was. If the statement of the branch manager was that the picture had been sold to Schine, then if it had been sold to Schine it will be shown by the evidence of the contracts that have been made, and the fact that a branch manager of Metro made an admission that it was sold to Schine is no evidence whatever that it had been sold to Schine, and therefore not material on that account. Of course if it is a case where in fact the other evidence shows that the picture had been sold to Schine, no harm has been done, but no good has been done, because the direct evidence is the simplest and best way of showing that, and to the extent that the sales are contended for they are in process of being shown by the actual contracts made.

Now, I urge that this is an entirely different situation from the one that was presented to your Honor before because of the limitations upon the authority which have been [fol. 1634] introduced in evidence, uncontradictable evidence, the actual fact of the matter that the branch manager did not have authority to tell what his company elsewhere had done, not through him, by somebody else, of which he could only have information which had been transmitted to him, if it had been transmitted to him; that he had no authority to indicate what the policy of the company was. His authority was to take an application, if it was made, make his recommendations on it, and if they were favorable, transmit it to the company. And that was the whole of the authority. He was not authorized to make any such declarations as a general conversation would, if there was any, bring out.

Mr. Wright: If the Court please, Mr. McClennen's argument simply has not any relevance to what we are trying to prove here. As a part of our case we expect to show that in certain instances, of which this is one, where there was a regular customer of a major distributor in the town [fol. 1635] who had been playing the product and using it regularly, that when Schine came in, the season when Schine came in, he was not given the opportunity even to negotiate for a continuance of his relations with the major distributors. The only way in which the facts may be brought out in those situations, as to what happened between the independent exhibitor and the distributor is to do what we are doing here and ask for the conversations that occurred

between the exhibitor and the representative of the distributor who dealt with him, as to whether or not the product was offered to him or whether it was not. That is the principal thing that we are trying to establish here. You cannot establish that simply by introducing contracts. They do not show anything with respect to negotiations. What we have to do is to show that in these situations I have described the product was not offered to the independent, and the only way that can be shown is by evidence such as we are proposing to offer here.

[fol. 1636] Mr. McClennen: The suggestion that this is not relevant to the case we are trying I think must be treated as a matter of alluring and delightful humor. The relevancy of my discussion, whether it is sound or not, I think is apparent to your Honor. There has been no objection to this witness stating what product he had up to the time that the Schine interests came into the town. Now, what the Schine interests got of the product is to be shown by the contracts that they made, and if they made contracts that absorbed the product then the whole story has been told. Of course this witness could not get pictures that had been sold to Schine. The important thing, after showing that the Schine interests had come into the town, is to show what contracts had been made by Schine, and when those have been shown that ends the Schine connection with this feature. If it was a violation of the anti-trust laws for Schine to buy those pictures—which of course we urge that it was not—that ends the story. If it was not a violation [fol. 1637] of the anti-trust laws for Schine to buy those pictures, then that ends this department of the story. But the effect upon this witness is made up of the fact that this witness had bought certain distributors before this time, and that after that Schine bought those distributors, and the effect upon this witness is just the same from that purchased by Schine, whether the branch manager said something to him or not. It is self-evident that the pictures could not be sold to him if they had been bought by Schine, and the rest of this would be merely, if it served any purpose, a means of having a branch manager tell what had been done, and that is just as much hearsay when that statement is made by a branch manager of a concern that is not a party to the case and not within the authority of the branch manager to make as the purest instance of hearsay testimony.

The Court: Well, evidently you presume what the answer will be. You presume that his answer will refer to the fact [fol. 1638] that the contract had been made by Metro with Schine. That is one thing. And then there is the question of whether the answer may go farther than that, from the nature of the question.

This is an important matter to decide at this time because, as Counsel for the defendants have pointed out, it is a question that will arise here, I assume, very frequently with reference to the testimony of conversations had with branch managers. It is very important that I decide it correctly. It is going to take some time to discuss here the question of his discretion and the question of the order of proof, that a conspiracy must first have been shown before such acts may be shown.

I call your attention to the Supreme Court decision that declarations may be shown of a direct co-conspirator, over objection, who was not present when they were made, only if there is proof that he is connected with the conspiracy. I would take it that goes to the discretion of the Court; [fol. 1639] that does not go to the question of the order of the proof. I take it that it means there must be a connection shown. I think the order of the proof is for the Court, do you not? Do you not think that is the meaning of that?

Mr. McClennen: I think, if your Honor please, of no more precise and definite statement that could be made than that statement of the Supreme Court that this evidence is not admissible at all until there is evidence aliaunde of the existence of the conspiracy. That must come. And I feel fortified in my interpretation of that language by the action of the other trial courts that have acted since that language was used, and that is set out extensively in the same memorandum, on pages 1 to 7 of the gray memorandum.

The Court: There are two cases referred to in those pages. One is the Aluminum case and the other is the later case of the United States Gypsum Company.

Mr. McClennen: Those are, I submit, actions by co- [fol. 1640] ordinate Judges exactly in accordance with what I am contending for and an interpretation exactly as I urge it of the language of the Supreme Court.

Now, in addition to that, may I ask your Honor's consideration of page 12 of the same memorandum where the Court of Appeals says, "The declarations of another, not covered by the principles of agency, and which depend for

their ultimate rightful presence in the case upon the finding by the jury that a conspiracy did exist should not be received preliminarily or retained in the case except with great care and caution. This will not be overlooked on retrial." And that was the ground on which that case was sent back.

The Court: That is declarations that are not covered by the principles of agency.

Mr. McClennen: Yes, there is involved here the question of the agent's authority to make it and the existence of the conspiracy.

The Court: That does not relate to a case where the ques- [fol. 1641] tion of agency is involved. It says "Not covered by the principles of agency." It says "The declarations of another not covered by the principles of agency and which depend for their ultimate rightful presence in the case upon the finding by the jury that a conspiracy did exist should not be received preliminarily or retained in the case except with great care and caution." Perhaps they may claim it is involved here.

Mr. McClennen: The princi*pal* of agency here spoken of is the agency of, I will say, the President of Fox to speak for Schine. If in some way the President of Fox had been given authority to speak for Schine, then the principles of agency would make his statement the statement of Schine. The Court says, "Except for that," the statement of the President of Fox, we will say, for illustration, is not to be received against Schine. Here we have the double thing, that there is no evidence of the conspiracy which would render Fox's own statement admissible against Schine and there is no evidence that this branch manager [fol. 1642] had autho[illegible] to speak in this way for, in this case, Metro.

The Court: That goes to the order of the proof, I think. As pointed out here, it must be received with great caution.

The matter that troubles me is the question that arises very often where the charge is conspiracy. It is often asserted that you have got to prove the conspiracy before you do something else. These something-elses may relate to the question of conspiracy itself and the conspiracy often is not shown by a single act, but it is a combination of acts which are gathered together to make a total. It seems to me that in a conspiracy charge the order of the proof should rest with the trial court.

Mr. McClennen: If it was other facts that by accumulation would show a conspiracy——

The Court: That itself is a question that may involve other facts.

Mr. McClennen: For that reason conversations taking place by the Schine defendants, although entirely innocuous [fol. 1643] in themselves, may conceivably be admissible in the court's discretion to build up the structure, but here this man has no authority.

The Court: Just take your statement there: Assuming the proof later on shows that in this specific case he was authorized to say that they would not let him have these pictures, or authorized to say something with relation to their relation to Schine, Metro's relations to Schine, on those things, irrespective of the question of general agency to make or deny a contract it may still be competent.

Mr. McClennen: If an entire stranger were the party to the conversation and the conversation was offered—let me put a simple illustration. The question is, "What are the instructions given to the motorman as to the way in which he should operate the car," in the simple accident case, and a witness comes along to say that the motorman told him that he had been told to operate in this way. There is the clearest case of pure hearsay and the admission of some- [fol. 1644] thing that is not admissible against the defendant company. If there had been some evidence suggestive of authority to make this particular statement, the authority of Mr. Booth to make this particular statement on behalf of Metro, only one step would have been covered, that of showing that this conversation rose to the dignity of a coversation by Metro.

[fol. 1645] The Court: With——

Mr. McClennen: With an outsider. Now, even that, if it was a conversation by Metro, in its proper person, would not be admissible against Schine to show the existence of a conspiracy or to show something done in the course of that conspiracy but here we have the affirmative evidence offered that shows that Booth did not have authority to speak for Metro in these respects and, therefore, that it isn't a declaration on the part of Metro, even to say nothing of its being a declaration in pursuance of a conspiracy with Schine.

The Court: Well, it seems to me that the question is the weight of the combination. I am inclined to agree with you that the statement made by the branch manager to the witness, standing alone, may have little probative force and amount to nothing, but I am viewing it from the standpoint, the broader standpoint of its connection with the establishment of the conspiracy. Standing alone I must say I am inclined to agree with you.

Mr. McClennen: If your Honor please, of course, the rule [fol. 1646] of admissibility is the same in the trial before a judge of the court as in the case of trial before a jury.

The Court: Well, that is not quite accurate. I think the order is of less significance in a trial before a Court than before a jury, don't you?

Mr. McClennen: Well, I think it is not legally less significant. Of course, we do have this, that we know of the much greater danger of a jury's giving effect to inadmissible evidence than of a learned judge giving effect to inadmissible evidence, but the rule of admissibility is the same in the two situations, and I submit that it would neither be a wise exercise of judicial discretion, nor within the proper powers of the Court, under the rules of evidence, as the Supreme Court has thus laid it down, to let a jury hear this conversation in the absence of proof alia unde that there was a conspiracy. The scope of that conspiracy sufficiently to show that this conversation was a part of the carrying out of that conspiracy, and that this [fol. 1647] witness had authority from the principal, Metro to make such a declaration.

The Court: Mr. Wright, how do you distinguish this Glassar case as to the declarations being admissible over objection of the conspirator, when it says that they are not admissible?

Mr. Wright: I would say, if the Court please, that language you just read and counsel's whole argument is directed to an entirely different point than the precise one involved here. We are not attempting to prove by the witness any statement by Booth, which is an admission that he or Metro are attempting to conspire with Schine. We are not attempting that here. All we are attempting to do here is show one circumstance which, together with many others, we think will make our case. The precise question here is that notwithstanding the fact that Mr. Mooney was the regular Metro account in the town and in

the normal course of business would have been given an opportunity to at least negotiate for the continuance of his [fol. 1648] run, that when Schine came in he did not even have the opportunity to negotiate for the continuance of the run; they simply took it away without giving him any opportunity to discuss terms or anything else. Now, when we show that that occurs in a substantial number of situations where Schine comes in, that Metro takes the product away from the independent account in that manner, that those circumstances taken together with others indicate that there is a combination and an unlawful conspiracy between Schine and Metro to deprive the independent of an opportunity to compete with Schine in licensing Metro films in the towns where Schine operates. Now, we can save a lot of time if counsel wishes to stipulate that in every case where Schine came in and took over a theatre and bought product away from an independent, that the distributor didn't even give the independent an opportunity to negotiate for that run. We think that is a significant circumstance to be proven and taken with many others.

The Court: You are asking here for a conversation.

[fol. 1649] Mr. Wright: Yes.

The Court: Would it meet your purpose to show what was done, what actually was done in connection with getting the run for 1938?

Mr. Wright: I say we think it is significant, not merely that Schine bought the pictures in situations of this kind; we say it is also significant that the independent, who was running them, was not even given the opportunity to negotiate for them before Schine bought.

The Court: Is proof of that required, the statement of some conversation between them?

Mr. Wright: I suppose that if we asked Mr. Mooney if he was given an opportunity to negotiate for the continuance of the run, that there would be an immediate objection that that was a conclusion and what we would have to show would be what his conversations or negotiations were.

The Court: You would have to show what was done from year to year on many of these pictures with reference to the agent coming to him, and how the pictures were procured.

Mr. Wright: That is what I wanted to show.

[fol. 1650] The Court: I suggest that the question of the particular statement by the branch manager—let me ask

you, first, is this Bellefontaine Theatre, is the contract between Schine and Metro for that year in evidence here?

Mr. Wright: I don't think that has been produced. I don't think they had the contracts that far back, but in any event, the contract itself only tells part of the story. It is always essential to show, as I say, unless counsel is willing to stipulate with us, that when these occurred they occurred without the existing account being given an opportunity to negotiate for the continuance of the run.

The Court: If that is the case, it might be required that you have other proof before the declarations are admissible, or the conversations, over the objection.

Mr. Wright: That was a criminal trial.

The Court: I don't know.

Mr. Wright: As your Honor pointed out, the order of proof in an equity case is completely discretionary. We don't say that we are going to prove by this witness or any [fol. 1651] other witness a conspiracy or any evidence which would establish a conspiracy. The only way we can prove our case is by showing what happened in these numerous instances where the independent came in against Schine, or Schine came in against the independent. The only proof I know that can be made there is to show what happened by the negotiations that occurred.

The Court: The question is that the language is susceptible to the interpretation, and before you can show the statements made——

Mr. Wright: Where there is a possibility of prejudicial error occurring that may be so.

The Court: As I pointed out before, I don't know whether you can prove a conspiracy except by circumstances and facts. I think the proof should be received at this time, but it has to be connected up. I will say that standing alone it has little of no probative force.

Mr. McClennen: There was no objection to the part of the examination that went to what is being talked about. The testimony was not objected to that Mr. Mooney had [fol. 1652] these pictures up to this time. There was no objection made to the testimony that he went to Mr. Booth to get pictures and there would be no objection to the testimony that he did not get the pictures, but to the conversation which could have no bearing on that the objection is made, because we believe that both in the criminal case, in the Glassar case the Court said what it did, but also in the

Aluminum case and in the Gypsum case, neither of which was a criminal case, the same rule was applied.

The Court: I doubt that the Aluminum case was the same as this, but in the other case, it is pretty difficult to determine from the transcript of the evidence just what was admitted.

Mr. Wright: Well, if we are going into the Aluminum case——

The Court: The objection is overruled.

Mr. McClennen: Respectfully we persist in the objection.

The Witness: May I hear the question again?

Mr. Wright: Yes, I will have it read. I am sorry, the stenographer who took the question has left the court room. I will repeat.

[fol. 1653] By Mr. Wright:

Q. Now, who was the person, who was the representative of Metro that you dealt with when you had bought the films for your theatre there for prior years?

A. They usually had a salesman.

Mr. McClennen: That I object to because it assumes he was the representative, and that is the thing we are debating. If he wants to know who was the branch manager with whom he dealt——

Mr. Wright: I asked him whom he dealt with.

Mr. McClennen: No, you asked who the representative of Metro was.

Q. Whom did you buy Metro films from?

A. A salesman.

Q. What was his name?

A. There were different salesmen during those six years; I wouldn't recall any particular individual.

Q. Did any salesman call on you with reference to the 1930-1931 product?

A. No, sir.

Q. Although he had called the prior years?

A. Yes, sir.

Q. With reference to each season's product?

A. That is right.

[fol. 1654] Q. And you had made a deal each year?

A. Yes, sir.

Q. Then, after the salesman, failed to call on you with reference to the 1930-1931 product, what did you do?

A. I contacted Eddie Booth, Branch Manager at Cincinnati.

Q. Where did you contact him?

A. I called him at Cincinnati.

Q. Do you remember when that was?

A. It was during a period of May or June to December.

Q. 1930?

A. 1930.

Mr. McClennen: I did not catch whether he said he called on him or called him.

The Witness: Called him on the telephone.

The Court: You mean different times?

The Witness: Numerous times.

By Mr. Wright:

Q. What did he tell you when you talked to him?

Mr. McClennen: This is the objectionable question.

The Court: Overruled.

The Witness: He told me he didn't have any pictures for the Strand Theatre for the coming season.

Q. Tell you why?

A. No, he didn't tell me definitely why at that time.

Q. Did he tell you later?

[fol. 1655] A. I met him at a convention in Columbus, a motion picture exhibitors convention, and at that time he told me the product had been sold.

Mr. McClennen: That is objectionable.

Q. When was this?

A. They usually held them in October or November.

Q. It was either in October or November of 1930?

A. 1930.

Q. You say you had a conversation with him there?

A. That is right.

Q. What was the conversation?

A. He told me the product——

Mr. McClennen: This is objected to for the further reason——

The Court: Yes, go ahead.

The Witness: He told me the product was sold for the New Holland Theatre which was owned by Schine.

By Mr. Wright:

Q. Did he tell you why they had sold it to Schine?

A. No.

Q. What if anything did you say?

Mr. McClennen: That I object to.

The Court: I will receive the whole conversation.

The Witness: He told me the deal was consummated in New York, and he didn't have any jurisdiction over selling the pictures.

[fol. 1656] Q. Then when was it that the Holland Theatre opened?

A. In February, 1931.

Q. Did it play Metro pictures there?

A. They picked up the older releases that were released from September until the time they opened, and they played those along with the new pictures.

Q. That is, none of the pictures released in Bellefontaine had been played, none of the Metro pictures released in the 1930-31 season had been played in Bellefontaine at all until the Holland opened in January?

Mr. McClennen: This is objected to as leading.

The Court: State the facts.

The Witness: The pictures released in September, October, November, December and January had never played Bellefontaine.

Q. That is prior to the opening of the Holland?

A. Of the new theatre.

Q. What admission prices were you charging at the Strand Theatre?

A. Either 30 or 35 cents, I don't know which.

Q. What prices did the Holland open at?

A. I believe they opened at 25, 15 and 25 cents. I believe it was 15 cents for the balcony and 25 downstairs.

Q. That is the evening admission price?

A. Evening admission.

[fol. 1657] Q. Do you know how many seats they had in the balcony?

A. No, I don't, but I imagine about four or five hundred seats.

Q. Then what was your evening admission price?

The Court: 30 and 35 cents.

Q. Did you maintain that price after they opened?

A. For a short time, and then we dropped to 25, I believe.

Q. 25 cents at night?

A. Yes, sir, we dropped to the same admission prices they were getting on the lower floor.

Q. They continued to charge 15 cents in the balcony?

A. I believe I am correct in that statement.

Q. Now, before the theatre opened there, did any one from Schine come to see you about buying or leasing your theatre?

A. No, sir.

Q. Did they afterwards?

A. Shortly after they opened they contacted me.

Q. Who contacted you?

A. I believe it was Mr. May.

Q. Whereabouts?

A. In Cleveland.

Q. Do you remember when that was?

A. No, I believe it was in March, the last of February or the first of March of 1931.

[fol. 1658] Q. What was the conversation you had with him?

A. They offered me $5,000 for the leases of the three theatres.

Q. That was which three?

A. The Majestic, Opera House and Strand.

Q. How much had you paid for those leases when you bought them from Mr. Gutilla?

Mr. McClennen: That is objected to.

The Court: Overruled.

Q. You may answer.

A. $15,000.

Q. Did you accept or reject the offer?

A. I rejected the offer.

Q. Then you continued to operate the theatre then?

A. Yes, sir.

Q. Were you making or losing money?

A. We were losing money.

Q. Why was that?

Mr. McClennen: Just a moment. I object to that.

The Court: Well, I——

Mr. McClennen: Statement of a conclusion.

The Court: The objection on the ground of a conclusion is sustained.

By Mr. Wright:

Q. When was the next time that you saw a representative [fol. 1659] of Schine about selling your theatre?

A. It was about five or six months later.

Q. Later than what?

A. After they opened their theatre; it was around May or June of 1931.

Q. Whom did you see then?

A. Mr. May.

Q. Where did you see him?

A. In Bellefontaine, Ohio.

Q. What was the conversation you had then?

A. He offered me $2500 for the theatre, and I took it.

The Court: For one or three?

The Witness: Three.

The Court: $2500?

The Witness: Yes, sir.

By Mr. Wright:

Q. That was in about June, you think, you sold out?

A. At the end of May or the first of June.

Q. And now had anybody called on you from any of the major film companies with reference to selling you 1931-32 product?

A. No, sir.

Q. In prior years when had they come to see you about the season's product?

The Court: Do you mean anybody of Metro or all [fol. 1660] companies?

Mr. Wright: I asked him with respect to all major companies.

The Court: When did they come in prior years?

The Witness: Usually right after the convention which was held some time in May. A number of exchanges used to sell their product before the convention, sometimes in January or February for the preceding years.

By Mr. Wright:

Q. You mean for the succeeding year?

A. Succeeding year, I meant to say.

Q. What were the circumstances which led you to accept $2500 for your $15,000 investment?

Mr. McClennen: That is objected to.

The Court: Well, he may state the facts. There must be no conclusion about it, whether he lost money——

The Witness: At first, because we were losing money; second, because I was afraid I wouldn't get any product for the coming season.

Mr. McClennen: I move to strike that latter part out.

The Court: No, I will let it stand.

By Mr. Wright:

Q. Calling your attention to the year 1935, do you know [fol. 1661] what theatres were then operating at Fostoria, Ohio?

A. 1935, there was the Colonial, Roxy and I believe the Civic was opened that year.

Q. Fostoria, was that in your Cleveland Exchange territory?

A. That was out of Cleveland, yes, sir.

Q. You were the manager of Warner Brothers Exchange there?

A. Yes, sir.

Q. Vitagraph?

A. Yes, sir.

Mr. McClennen: Branch Manager there.

The Witness: Yes, sir.

By Mr. Wright:

Q. Do you know who was operating those theatres?

A. Buck Brothers were operating the Colonial. I believe Mr. Kahn was operating the Roxy and Civic.

Q. Do you know whether the name of the Colonial was later changed?

A. I believe it is now called the State Theatre.

Q. So the State and Colonial are the same theatre in Fostoria.

A. Same theatre.

Q. I call your attention to this inter-office communication dated December 27th, 1935, that has been identified as Plaintiff's Exhibit 559, and ask you if that is your signature on there?

A. Yes, sir.

[fol. 1662] Mr. Wright: I will offer this.

The Court: What is the number?

Mr. Wright: This is 559. I offer it in evidence.

Mr. McClennen: Well——

Mr. Wright: If there is any argument about it, I will just use it to refresh his recollection and save you the trouble.

Q. This exhibit, I will ask you to read that——

Mr. McClennen: That is, you are not offering it at the present?

Mr. Wright: No.

Q. And ask you if that recalls to your mind negotiations you had with the exhibitor at Fostoria for a two-year deal?

A. Yes, sir.

Q. And who was that exhibitor?

A. Mr. Arthur Buck.

Q. That was the operator of the Colonial Theatre?

A. Yes, sir.

Q. And what negotiations had you had with him?

Mr. McClennen: That I object to.

The Court: Of course, the contract shows that.

Mr. McClennen. The contract, yes.

Mr. Wright: The contract wouldn't show the negotiations. What this memorandum refers to is a two-year deal [fol. 1663] which was forwarded and was not approved. It was rejected. I am asking him now for the negotiations that preceded the making of the deal that was forwarded.

The Court: The negotiations are shown by the instrument itself, even though it wasn't approved.

Mr. Wright: No, I don't think so, if the Court please, in any event, we don't have the deal itself, anyway.

The Court: All right.

Mr. McClennen: This is asking this witness about a negotiation with another exhibitor which it seems resulted in an application which was sent forward. Now, we were not parties in any way to that negotiation. It wasn't conducted

on our behalf anyway. It wasn't any part of any conspiracy in any way. It is totally immaterial, I submit, in this case, what the negotiation was. The fact that a two-year deal was sent forward and was approved or disapproved by the home office, is the whole of the story, so far as this case that we are trying is concerned, and what negotiations he had had with this outsider, which was put into this [fol. 1664] proposed agreement for two years, is wholly immaterial to anything that we are trying here, I submit.

The Court: How is it, Mr. Wright? I don't see how negotiations between him and these people are connected with Schine.

Mr. Wright: What we expect to show is, this exhibitor attempted to make a two-year deal with Warner Brothers to give himself protection because he had heard Schine was coming into town. The deal was forwarded. We expect to show it was disapproved because Schine then made a deal for Fostoria for taking over the proposition, took the opposition theatres and made a deal which included their product and then this exhibitor was given only half of the Warner Brothers' run; in other words, his product was taken away from him by a circuit deal without his having been given any opportunity to negotiate for the continuance of his full, regular run.

The Court: I suppose the negotiations between him and the other theatre operator were included in this memorandum?

[fol. 1665] Mr. Wright: This refers to negotiations between him and Mr. Mooney as Exchange Manager for Warner's.

The Court: Why wouldn't the papers cover it and show what the negotiations were?

Mr. Wright: If it shows what the negotiations were, I think it would. It so happens all the paper on its face is "Enclosing two-year deal for the Colonial Theatre, Fostoria. This is a very good deal and suggest you let us have your approval". I simply want to show the circumstances which led up to the making of the deal.

Mr. McClennen: I will ask that Mr. Wright's statement of the contents of this letter, not yet in evidence, be excluded, and ought not to be stated as the contents of a document not in evidence, and not at the moment even under offer. May that be excluded?

Mr. Wright: I don't see how the court can determine its relevancy without knowing what is in it.

Mr. McClennen: I think it is quite obvious that the Court could determine the relevancy of the question under discussion, which wasn't the contents of the letter at all, and we [fol. 1666] ought not to have spread into the record a statement of the contents of this letter until this letter is admitted in evidence. I ask that be excluded at present.

The Court: Strike it out. Proceed with the questions, Mr. Wright. What was the question?

(Preceding question read.)

The Court: I think the use of the word *of* "negotiations" is improper.

By Mr. Wright:

Q. What conversations had you had with Mr. Buck prior to the time you wrote this letter marked Exhibit No. 559 for identification?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: We worked out a two-year deal and I submitted it to New York.

The Court: That is not the conversation.

Q. Prior to the time you worked out the deal, or in the course of working out the deal, did Mr. Buck, in any conversation with you, tell you why he wanted that deal?

The Court: That is leading. Let the witness state the conversation.

The Witness: Mr. Buck understood Schine was taking over the opposition house.

[fol. 1667] Q. State what was said.

Mr. McClennen: May that go out.

The Court: Strike it out.

The Witness: The conversation was Schine was taking over the other house and he would like to get a two-year deal to protect the product for his theatre.

Q. And you say a deal was made?

A. Yes, sir.

Q. Then the deal you made was the one that was forwarded with this Exhibit 559?

A. Yes, sir.

Mr. Wright: I will offer this in evidence.

Mr. McClennen: I raise the objection that it is wholly immaterial. It has appeared from the witness' testimony——

The Court: The deal was made, you mean what the result of the negotiations between him and the other party were, which were consummated in the paper?

Mr. Wright: Yes, which was forwarded.

The Court: The deal, of course, involves and means the contract and the contract shows the agreement between the parties.

Q. What form was the deal in?

[fols. 1668-1669] A. The application for a contract was drawn up and signed by Mr. Buck and forwarded to the New York office.

The Court: Application?

Mr. Wright: Application.

The Witness: Yes, sir.

The Court: I understood it was the contract.

Mr. Wright: Well, an application.

The Court: I think we will have to suspend at this time until 10 o'clock tomorrow morning.

(Whereupon a recess was taken until Tuesday, October 3rd, 1944, at 10 o'clock a. m.).

[fol. 1670] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants.

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 3rd, 1944, at 10 o'clock a. m.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for Defendants.

[fol. 1671] PROCEEDINGS

(Reporters' note: Corrections: Page 1613, line 20, change the word "can" to read "can't."

Page 1613, line 21, change the word "can" to read "can't."

Page 1615, line 5, change the word "sell" to read "open.")

Mr. McClennen: If your Honor please, I want to speak to a matter of personal privilege. Your Honor knows the difficulties in getting transportation these days, therefore, would your Honor tell us whether you are going to sit on the 12th of October. Personally I should like to sit on the 12th. If we are not going to sit on the 12th, which is Thursday, I should like to get your Honor not to sit on the 13th, because I can get a gap big enough then to go home.

The Court: Why do you inquire about the 12th?

Mr. McClennen: It is a holiday.

The Court: There is no holiday.

Mr. McClennen: You are going to sit on the 12th?

The Court: Yes.

Mr. McClennen: That answers my question.

The Court: Unless you do not want to.

[fol. 1672] Mr. Wright: I think we want to sit, your Honor.

The Court: Oh, yes.

Mr. Wright: Mr. Mooney, will you resume the stand?

Milton A. Mooney resumed the stand by and on behalf of the Plaintiff, and testified further as follows:

Direct examination (continued).

By Mr. Wright:

I will ask to have this photostatic copy of the contract between Vitagraph, Inc., and A. J. Buck, for the exhibition of pictures in the Colonial Theatre for the 1935-36 season,—I believe the contract is dated July 10th, 1935,—which is in the folder which has been previously identified as Exhibit 635 to be marked 635-A for identification.

Mr. McClennen: Is this for identification, or are you offering it?

Mr. Wright: This is for identification.

The Court: 635, I have that referring to Auburn.

Mr. Wright: 635, if this is correctly marked, included Auburn, Norwich, Amsterdam. Auburn is the first town. [fol. 1673] It also includes Fostoria. This contract came from the Fostoria group.

The Court: All right.

(Thereupon photostatic copy of contract between Vitagraph, Inc., and A. J. Buck for the exhibition of pictures in the Colonial Theatre for the 1935-36 season, dated July 10, 1935, referred to, marked as Plaintiff's Exhibit No. 635-A for identification.)

Mr. Wright: We will ask to have the contract for the Civic and Roxy Theatres dated March 18th, 1937, between Vitagraph and Schine Enterprises Corporation, which comes from this same folder, marked as Exhibit No. 635-B for identification.

(Thereupon contract for the Civic and Roxy Theatres, dated March 18th 1937, between Vitagraph and Schine Enterprises Corporation, Inc., referred to, was marked as Plaintiff's Exhibit No. 635-B for identification.)

Q. Mr. Mooney, I hand you this contract that has been identified as 635-A, and ask you if you recognize that as the contract under which you were serving Mr. Buck with first-run pictures at the Colonial Theatre during the 1935-36 season?

A. Yes, sir.

[fol. 1674] Q. Now, in your testimony yesterday when you referred to this two-year deal that was submitted with the letter marked for identification as Exhibit No. 559, was that deal on a form of contract similar to the one you have in front of you there?

A. Yes, sir.

Mr. McClennen: Just pause momentarily. May that answer go out for a moment? Has an attempt been made to get the document?

Mr. Wright: Well, we subpoenaed all of the contracts which they had, and applications.

Mr. McClennen: Did you subpoena the applications?

Mr. Wright: I am not sure, but I think they were included.

Mr. McClennen: Obviously it is much better to have the application itself, if it is obtainable, than to attempt to have the witness state it.

Mr. Wright: For our purpose it is purely explanatory.

The Court: The form will not prove its contents.

Mr. Wright: I am not undertaking to prove its contents.

Mr. McClennen: If it is merely asked if it is on that form——

Mr. Wright: The question was raised yesterday as to what was meant by a deal, and I am just trying to explain it.

The Court: I think that was explained yesterday.

[fol. 1675] By Mr. Wright:

Q. Well, in any event, what was forwarded was a signed application?

A. Yes, sir.

Q. Then do you recall receiving this day letter addressed to you dated March 25th, 1936, from A. W. Smith, Jr., which has been marked for identification as Exhibit No. 560?

A. Yes, sir.

[fol. 1676] Q. Do you recall what the occasion was for that telegram?

Mr. McClennen: That is objected to as to form. It presents the opportunity to the witness to state his conclusion.

The Court: He may state what occurred prior to that.

Mr. McClennen: That is the very purpose of my objection. It remains to be seen if what occurred is going to be of such a nature that it would be admissible.

The Court: You would first have to find out what occurred.

Mr. McClennen: And that is different from asking a conclusion. That is my objection.

The Court: He may state what occurred prior to that in connection with the letter.

Mr. McClennen: This is subject to our general objection, if your Honor please, as to conversations.

Mr. Wright: We are merely attempting to show what happened with reference to this particular deal.

The Court: He said he wired. I will let him state what it related to, without stating the contents.

A. This answer is a reply to my wire requesting approval of the application for Fostoria.

Q. What occurred that caused you to send that wire?

[fol. 1677] Mr. McClennen: That is objected to.

The Court: Overruled. State the facts about it. What happened?

A. Mr. Buck wanted to know whether his application had been approved or not.

Q. What is the interval that normally elapsed between the time that you forwarded an exhibitor's contract application and the time that you received notice of approval or rejection?

Mr. McClennen: That is objected to. It is perfectly obvious from the papers that we have seen that there is an almost infinite variety of lapses of time and there is not any such thing as the question assumes, a normal length of time.

The Court: I think the objection is well taken. I will let him state the time and the Court can determine under all the facts whether it was a normal time or not; that is, a reasonable time.

Mr. Wright: The time here, of course, is apparent on the face of these exhibits.

The Court: He may state it in connection with the other facts, whether it was a reasonable prompt response. The

[fol. 1678] objection to it is whether it was a normal time. That objection is sustained.

By Mr. Wright:

Q. You recall receiving this telegram addressed to you from Mr. Mochrie, dated April 1, 1936, which has been marked for identification as Exhibit 561?

A. Yes, sir.

Mr. McClennen: This is not a telegram that has been handed the witness.

Mr. Wright: Whatever it is, it speaks for itself.

Mr. McClennen: You called it a telegram.

Mr. Wright: It says at the top "Telegram." That is why I called it that.

Mr. McClennen: It is obviously not a telegram.

The Court: Call his attention to this paper? Do you recollect receiving this paper marked Exhibit 561 for identification?

The Witness: Yes, sir.

By Mr. Wright:

Q. What did you do after you got that?

A. I sold Mr. Buck half the product, the First National group only, for one year.

The Court: One-half of the National product group. What one is that?

The Witness: We were selling—the first half was First [fol. 1679] National and the other half was Warner's, and Mr. Buck got the First National group.

The Court: What do you mean by the First National group?

The Witness: There is a group of pictures under the title of First National Pictures.

By Mr. Wright:

Q. You recognize this contract, dated May 18, 1936, signed by Mr. Buck, marked for identification as Exhibit 563, as the deal you are referring to?

A. Yes, sir.

Q. As I understood your explanation to the Court the designations Warner Productions and First National Productions are merely trade names?

A. That is right.

Q. All of that product was sold by Vitagraph?

A. That is right.

Q. I will hand you this contract for the exhibition of the Vitagraph films in the Civic or Roxy Theatre at Fostoria, dated October 21, 1936, with some sheets attached, all marked as Exhibit 568 for identification, and ask you if you can tell us when you first saw that?

A. This deal sheet was mailed to me from the New York office and I, in turn, made up the contract for Warner Bros. Productions and forwarded it to Mr. Schine for signature.

[fol. 1680] Q. I call your attention to this document entitled "Contract recommendation", which has been marked as Plaintiff's Exhibit 567, and is dated October 21, 1936. Is that your recommendation that appears at the bottom there?

A. Yes, sir.

Q. And what was done with that recommendation?

A. It was forwarded to New York with the contract.

Q. With the Home Office copy of the contract?

A. With all the copies of the contract.

Q. And by the contract you are referring to this contract marked Exhibit 568 for identification?

A. Yes, sir.

The Court: Does it appear who signed Exhibit 568?

Mr. Wright: I believe that is signed by George Lynch on behalf of Belpik Theatre Corporation.

The Court: There is another signature also. What is the other signature?

Mr. Wright: On behalf of Vitagraph by G. L. Sears.

The Court: That is what I wanted to know.

By Mr. Wright:

Q. I will show you this contract marked as Exhibit 635-B for identification, which is dated March 18, 1937, signed by Mr. Lynch and Mr. Sears, covering a repeat run of First National Productions in the Civic or Roxy Theatres in [fol. 1681] Fostoria, and ask you what, if anything, you had to do with that contract?

A. I had the application and I believe this deal here also covered the second-run.

Q. When you refer to this deal you are talking about this deal sheet marked as Plaintiff's Exhibit 568, pages 2 and 3?

A. Yes, sir.

The Court: He asked you what you did.

A. I submitted it to Mr. Lynch for signature and then, in turn, forwarded it on to New York for approval.

The Court: It appears who Lynch was. That is sufficient, isn't it?

Mr. Wright: I think it appears from the answers to the interrogatories. I thought we had read it into the record that he was the film buyer for the defendants.

Mr. McClennen: That is correct, if your Honor please.

The Court: You said this was signed by Lynch and who?

The Witness: By Mr. George Lynch, and Mr. Sears approved it for Warner Bros.

By Mr. Wright:

Q. Did you have anything to do with negotiating these deals that Mr. Lynch signed, which are identified here as Exhibits 568-A and B, respectively?

A. No, sir.

[fol. 1682] Q. Mr. Mooney, during the period that you were Branch Manager for Warner at the Cleveland Exchange, what was the practice, if any, with respect to negotiating product deals with exhibitors who were regular customers?

Mr. McClennen: That is objected to as assuming that there was a general practice there.

Mr. Wright: I will insert "if any" in the question.

Mr. McClennen: And that does not remove its leading character and the suggestiveness, and it is not for this witness to state a practice as with respect to us. It wasn't our practice; it was not the practice of any defendant in this case that he is asking, and we submit it is not admissible to show a practice of that office and that this witness is not one who should be permitted to state it. The scope of the duties of the office have been stated and, if anything more is wanted, it should come from those who control the making of practices for the Company. We submit that even that is not admissible as against us, but certainly should not come from this witness.

Mr. Wright: If the Court please, what we are asking the witness to do is to state what the facts were as to [fol. 1683] how the business that he was delegated to conduct was carried on in his territory. He is certainly competent to give that testimony, and the most competent person who could be brought here to do it.

The Court: Well, you inquire in reference to the practice in making contracts.

Mr. Wright: As to what was done.

The Court: If he, as Branch Manager, signed these contracts and they were not signed by superior officials, you better show that fact.

Mr. Wright: All I am referring to is the practice with respect to solicitation, which is the function he performed. There isn't any dispute about the fact he didn't sign the contracts. It has already appeared that he solicited applications in his territory. He would take applications setting forth terms on which they agreed, and they would be forwarded to the home office for approval. I am merely asking what his practice was with respect to solicitation of regular accounts.

[fol. 1684] The Court: In what respect?

Mr. Wright: With respect, specifically, as to whether or not the product they had been using for one season was again offered for the next season; whether they were solicited for that product.

Mr. McClennen: It has already appeared that the solicitation was by designating the salesman to call upon those that it was deemed desirable by the company that they should call upon them. That is not a practice. The policy of the company with respect to selling, we say, so far as we are concerned, again is not admissible, but if there is anything of this kind admissible it is the policy that was the policy of the company, not the policy of a particular office. It can't be reduced to terms of practice, anyway. Obviously, when there was one available theatre in a town the thing to be expected was that a solicitor would be sent to try to get the product into that town. If there came in another and better theatre it was a matter of judgment of the company which they should seek to have become the customer, and that was not a matter of practice, it [fol. 1685] was a matter of particular situations as they arose, and to speak of it as a practice assumes in the

question a fact, or a claimed fact that we assert is not a fact, and has not been proved. It is clear enough that when a town had but one theatre, or when it had a customer that had been satisfactory for a long time, it would be the natural desire to get that man's business. When a theatre more desirable to the distributor came in, it would be the natural thing to want to get that business, and it is not a matter that can be characterized in a question or in an answer as a practice, and that I submit for your Honor's consideration.

The Court: Your objection made was the reference to the practice of the agent rather than the practice of the company, thus intimating the practice of the company itself might be competent.

Mr. McClennen: I said, when speaking of the practice of the company, we deem that is not admissible against us, but still farther removed from admissibility is this prac- [fol. 1686] tice of a particular office, but the major objection is that it is all based on the assumption that there was a general practice, when it is obvious from what has already gone into the case that it was a matter of individual occasions and situations, as the interests of the distributor dictated their method of placing the product for the particular year in the effort which they would always be making to get it into the theatre that, from their standpoint, was the one likely to produce the best results to the distributor. It isn't a practice at all.

The Court: Mr. Wright, wouldn't it serve your purpose to seek to show just what he did in such cases from year to year without referring to it as a practice?

Mr. Wright: Yes, I think I can make it more specific and perhaps that will obviate the objection.

By Mr. Wright:

Q. This situation that you had in Fostoria, where there three theatres, two of which were owned by one party and one by another, that is, where you had a choice of accounts [fol. 1687] in the town, was not an unusual or unique one, was it?

A. No, sir.

Q. There were other towns in your area where you found there were two theatres or more theatres, and one of them

was the outlet you sold regularly for your pictures, is that right?

A. That is right.

Q. Now, with respect to those situations where there were competitors, did you customarily offer or solicit your regular accounts for the film before you negotiated with or made a deal with the opposition, or did you simply take the films away without giving the old account an opportunity to negotiate?

Mr. McClennen: That question is objected to as leading and misleading.

The Court: Of course, customarily, you might say the same habit obtained. It is a question of what the fact is. Did you, as a question of custom, did you go back to the old licensee?

The Witness: We always solicited our regular accounts, the accounts we had been doing business with the previous year.

By Mr. Wright:

[fol. 1688] Q. And in the course of solicitation would terms be discussed with them?

A. Yes, sir.

Q. And, if terms were satisfactory, what would you do then?

A. If the terms were satisfactory, we would draw up an application of a contract and forward it to our New York office for approval.

Q. What if New York rejected it?

A. We would resolicit the account and try to improve the deal.

The Court: You mean by improving the deal——

The Witness: To get better terms.

Q. Now, was that practice followed in this case?

Mr. McClennen: That is objected to.

The Court: Sustained. Did you do that in this case?

The Witness: No, sir.

Q. Did you receive any information from the New York office as to why that shouldn't be done other than the information that is contained in this exhibit No. 561, the wire to you of April 1, 1936?

Mr. McClennen: Just a moment. That is objected to.

The Court: I think that is objectionable information. What was the fact? Whether it amounted to a letter, of course, a communication is a communication.

[fol. 1689] Mr. Wright: I asked him if he had any other communications with respect to that other than the one I called his attention to.

The Court: I will let him answer that, whether he had any other communication from the company other than the one to which you referred.

The Witness: Yes, I had another wire or letter stating that——

Mr. McClennen: Just a moment, not what the wire or letter stated.

The Court: You had a wire?

By Mr. Wright:

Q. When was that?

A. There was a number of them between December and April first.

[fol. 1690] Mr. Wright: I will offer this Exhibit 561 for identification in evidence.

The Court: That is the contract with Buck?

Mr. Wright: That is the document marked "Telegram," from Mr. Mochrie to Mr. Mooney; dated April 1, 1936. It is marked Exhibit 561 for identification.

Mr. McClennen: Without waiving our objection that this is a purely local transaction and to this type of evidence, we understand that this one will be Exhibit 561.

Mr. Wright: That is right.

The Court: Received.

(The document, from Mr. Mochrie to Mr. Mooney, dated April 1, 1936, previously marked as Plaintiff's Exhibit 561 for identification was received in evidence.)

Mr. Wright: This is a telegram dated April 1, 1936, addressed to Mr. M. A. Mooney, Cleveland office. "Reject definitely Fostoria deal Stop You may offer Buck half of the product for one season only, namely First National group season 36-37 STOP For your personal information will sell Schine Warner half. R. Mochrie."

[fol. 1691] Now I would like to read in evidence the Schine answer to interrogatory No. 17-A, page 33, from which it appeared that the defendant's interests in the Civic and

Roxy Theatres at Fostoria, Ohio, was acquired in May, 1936.

Mr. McClennen: That is correct, if it is meant that a 50% interest was acquired at that time. That date is correct.

The Court: 50% in each one or just one, do you mean?

Mr. Wright: 50% in each, or, I believe, 100% was acquired in each.

Mr. McClennen: That was a 100% interest acquired at that time in May, 1936.

Mr. Wright: In the Civic and Roxy Theatres?

Mr. McClennen: In the Civic and Roxy Theatres.

Mr. Wright: Have you here Exhibit 68 for identification? I believe that is the agreement that was made with the Bucks in July, 1937, which will complete the transaction.

Mr. McKay: It is Exhibit 89, as I recall (handing to Mr. Wright).

The Court: Is it marked for identification?

Mr. McKay: Exhibit 89 for identification.

The Court: That would be in 1937?

[fol. 1692] Mr. Wright: This is dated May 29, 1937. I will offer this Exhibit 89 for identification in evidence.

Mr. McClennen: To avoid confusion in the record, this does not refer to the Civic and Roxy Theatres, does it?

Mr. Wright: I believe it covers the pooling arrangement under which the Roxy, Civic and State were all taken together.

Mr. McClennen: This agreement of May 29, 1937, was the agreement with the Messrs. Buck and others, by which the operation of the three theatres was to go into a new organization in which the Bucks and others would have 50% and Belpik Theatre Corporation, a Schine subsidiary, would have 50%. This, of course, goes in subject to our general objection that this is a purely local transaction and in character not one having any tendency to restrain interstate commerce.

The Court: How many theatres were there in Fostoria which were involved?

Mr. Rogers: Three theatres, the Civic, the Roxy and the State.

[fol. 1693] The Court: Those were Buck or Schine?

Mr. Rogers: Buck had one. We had two and he had one.

The Court: Received.

(The agreement, dated July, 1937, previously marked as Plaintiff's Exhibit 89 for identification was received in evidence.)

Mr. McClennen: And a photostat will be substituted for that.

The Court: He can mark it and then the photostat will show it in that form.

What do you claim for that, Mr. Wright? It seems to be a separate sort of an agreement.

Mr. Wright: It is simply a part of the whole story here as to what happened in Fostoria. The Bucks were softened up, you might say, for the pooling agreement by this demonstration that Schine could take half the Warner product away from them, as was done in this series of negotiations that have just been described.

Mr. McClennen: There has been no evidence thus far that Mr. Buck was softened up at all. Mr. Buck was put on the stand and was not interrogated on that subject at all.

[fol. 1694] By Mr. Wright:

Q. Had Mr. Buck been a satisfactory account?

A. Yes, sir.

Mr. McClennen: Just a moment. That I object to. What was satisfactory was a matter of the determination of the headquarters. It made no difference whether the branch manager was satisfied or not. It was for the headquarters to determine to whom they would sell, whether a man was sufficiently satisfactory or another one was more satisfactory. We object to the question.

The Court: Objection sustained. I think the Court may presume that he was a satisfactory client unless the contrary is shown.

Mr. McClennen: The presumptions, of course,—whatever presumption is appropriate on the evidence when the evidence is closed is not now up for consideration. We are urging that it makes no difference whether this man was satisfactory to this particular branch manager, because it was not within his province.

The Court: I think the Court, as the record stands, could find from the fact that he dealt with this company from year-[fol. 1695] to-year, that his dealings were satisfactory up to that time, until the contrary is shown.

Mr. McClennen: We have no objection, if your Honor please, to his showing what had been done.

The Court: I sustained your objection.

By Mr. Wright:

Q. Mr. Mooney, was any fact brought to your attention at any time which in your opinion would have justified taking the product away from Mr. Buck?

Mr. McClennen: That is objected to as leading and argumentative and calling for an opinion which this witness is not qualified to express, and not the one who should determine how it should be treated.

The Court: I think the form of your question is bad. He may state whether anything else occurred. If anything occurred in reference to the non-continuance of the contract he may state it. Was there anything else that occurred between your Company and Buck other than you stated that related to the non-continuance of the prior arrangement?

The Witness: Mr. Buck was always considered a very [fol. 1696] good account.

The Court: Strike it out.

Mr. McClennen: That is objected to.

The Court: It is not responsive, anyway.

Mr. Wright: I do not think you understood the Court's question. Will you repeat the question?

(Question read.)

A. No, sir.

Mr. Wright: I also want to offer in evidence this recommendation, Exhibit 567 for identification.

Mr. McClennen: This is objected to on the general ground that the inter-communication between the branch manager and the home office and the statements therein contained are not admissible in this case, and on the further ground that it is a palpable statement of what somebody else did and not what this witness did, and stating a conclusion that is not supported by evidence and cannot be supported by evidence.

The Court: Who do you mean by somebody else's statement? It was signed by the witness, was it not?

Mr. McClennen: It is signed by the witness, but it states what somebody else did, not what he did.

[fol. 1697] The Court: I think it is a part of a chain. You have not attempted to show what followed that.

Objection overruled.

Mr. Wright: This, if the Court please, is a summary——

The Court: Have it marked in evidence.

(The document referred to, previously marked as Plaintiff's Exhibit 567 for identification, was received in evidence.)

Mr. Wright: It is a summary comparison of the terms of the deal for half of the product sold to Schine, with the notation that they had not been sold the year before, and under the heading "Recommendation" appears the statement, "This deal was sold by Mr. Kalmenson and involves considerably less money than we are getting from the opposition house with whom we have been doing business for a number of years."

Mr. McClennen: Now that the language has been read to your Honor we move that that be stricken out because it is now evident that this is a hearsay statement of what somebody else had done and not the statement of the witness's own doing, and also the general objection that this is not a transaction that is admissible by hearsay in this way in the [fol. 1698] absence of any evidence that there had been a conspiracy formed at this time, the scope of which was such as to call for this declaration by the branch manager. We urge that that language be stricken from the record.

The Court: I will see what the testimony is. Objection overruled at this time.

[fol. 1699] Mr. Wright: I now offer the contracts that have been identified as 568 with Pages attached to that exhibit, 563 and 635-A and 635-B.

The Court: Are those marked separately?

Mr. Wright: Those are all separately marked; that is four contracts.

The Court: Oh, I see.

Mr. Wright: One of them has attached a couple of pencil sheets.

Mr. McClennen: There is clipped to this contract, Exhibit 568 for identification, a number of memoranda, no part of the contract, not proved in any way, and should not be a part of the contract. They do not bear the same date as the contract or anything anywhere near that date. I think that the simplest thing would be to take the contract by

itself. We have nothing to indicate that the papers have any relation to the contract. Of course, we make our general objections that this is a local transaction, not between us and Warner Brothers, not admissible, but assuming that your Honor will be ruling on the general objection as you have done, we urge that these papers be not marked. [fol. 1700] They do not belong to the contract.

Mr. Wright: If the Court please, this Exhibit 568, the contract and the sheets attached were all marked and were attached together as they came from the files of the company. The witness has already testified that the attached sheets are the work sheets from which the contract was made up.

The Court: Does it appear that these 568 came back to this witness with that attached from the company?

The Witness: Those deal sheets were submitted to me to make up the contract from the deal sheets. These are the deal sheets that came to me from New York. I in turn made up this application and sent it to Mr. Schine for signature.

The Court: Then after it was signed by Schine's representative it came back to you?

The Witness: Yes, sir.

The Court: Did the deal sheet come back attached to it?

The Witness: No, I retained the deal sheet in my office.

The Court: You retained it and you attached it?

The Witness: This is a photostatic copy of the deal sheet.

Mr. McClennen: Those deal sheets, if your Honor please, [fol. 1701] are an entirely different date from the contract, a year away.

The Court: They would be a prior date ordinarily, according to the witness they are a prior date.

Mr. McClennen: But they are dated eight months in one instance before and eight months in another instance before the contract and in the nature of things could not be merely a statement of this deal. They do not purport to be. They purport to——

Mr. Wright: You are contradicting the witness. The witness has said they are. I suppose that controls until some one else testifies.

Mr. McClennen: As I was saying before the interruption, there is on here matter which is not the deal sheet itself, but bears a different date, and I am not contradicting the witness.

The Court: Bearing a different date, you mean by that two dates on it? You are speaking about the deal sheet?

Mr. McClennen: The sheet, each sheet has on it at the bottom a date and year which are eight months before this contract.

The Court: All right.

[fol. 1702] Mr. McClennen: And it is on that that I base my assertion that the papers show what I have stated.

The Court: What I am wanting to know is, and perhaps the witness can state it, these attached papers referred to as deal sheets, were they made up by you?

The Witness: No, sir, they were made up by Mr. Kalmenson. I believe it was Mr. Kalmenson made the deal in Gloversville, and they were forwarded to me.

The Court: What did you do with the deal sheets?

The Witness: We make an application in the form the gentleman is holding there and I sent it to Mr. Schine for signature. Mr. George Lynch signed it and forwarded it in to me, and I forwarded it to New York for approval.

The Court: Did you receive these deal sheets from Schine?

The Witness: From my New York representative.

The Court: From your company?

The Witness: Yes, sir.

The Court: Of course, and then were they sent by you later—who negotiated with you?

The Witness: To Mr. Schine.

Mr. Wright: He was referring to these.

[fol. 1703] The Court: The deal sheets?

The Witness: The deal sheets, I retained the deal sheets in my office.

The Court: You retained the deal sheets here in your office?

The Witness: Yes, sir.

The Court: Then they were returned to Warner?

The Witness: No, not unless Warner took the correspondence out of the office. Warner at New York would have a copy.

The Court: How can you say this contract, made in 1937 was based on the deal sheets dated eight months before?

The Witness: Because it was the policy of the Company to make their deals with Mr. Schine and forward the deal into the local office handling the theatres in that territory for the contract to be made up.

The Court: I am speaking about the disparity of the date.

The Witness: It is barely possible they could have held the contract for some time before they forwarded deal sheets to me.

The Court: You identify these as deal sheets on which the contracts were made?

[fol. 1704] The Witness: Yes, sir.

The Court: The objection is overruled.

Mr. McClennen: If your Honor please, might I say this much more before that becomes final. These sheets have notations upon them with reference to another theatre, not the theatre involved in the contract and bearing a date——

Mr. Wright: What theatre are you referring to there that you say isn't involved in the contract?

Mr. McClennen: The Colonial Theatre, which is not involved in the contract.

Mr. Wright: I think you are mistaken.

The Court: Look at the first contract.

Mr. McClennen: This deal sheet is attached to identification No. 568, which is for the Civic and Roxy only and, as I say, this is a contract the application being dated October 21, 1936, and this sheet dated December 31, 1935.

Mr. Wright: I think the witness can explain the reference to the Colonial if you will permit him to do so.

Mr. McClennen: This contract is being offered with this identification of it, as a contract. There was no interroga-

[fol. 1705] tion of the witness through whom the papers were offered as to any papers that might be in the files with the contract. There was nothing to draw attention to the fact that in this mass of papers, apparently presented as contracts, there were any other papers. Now, if these sheets should go in at all, and I submit that they should not, they should not go in as a part of this exhibit, because there has been no evidence indicating a physical connection with this contract. It has appeared that this contract, identification exhibit 568, came out of the New York office, and that the deal sheets to which the witness has testified were deal sheets that he had in the Cleveland office and did not himself send to the New York office and these are not original deal sheets, not the papers that he had, do not purport to be, and I submit that they should not be attached to this exhibit when no physical attachment has been proven by anybody. The questions put to the witness who iden-

tified the papers related to contracts and there was evidence referred to supposing that the folders-contracts and [fol. 1706] only contracts. Had this been presented while the witness was on the stand an inquiry could have been made to show that in fact these papers were not attached to this contract which we signed and which——

Mr. Wright: If the Court please, that is a complete mis-statement.

Mr. McClennen: Just a moment, that is not a mis-statement. And we signed——

The Court: You mean Buck wasn't interrogated, you mean?

Mr. McClennen: No, and the person who produced this file of papers wasn't interrogated on the subject of these deal sheets.

The Court: The witness just testified here they used the deal sheets for this contract, and this contract was made up on the basis of these deal sheets.

Mr. McClennen: But this is a contract, if your Honor please, put in as being a contract made by Belpik Theatre Corporation, signed by them, put in as the contract which we signed. We did not sign a paper with these deal sheets attached to it.

The Court: What the witness testified is that these were the deal sheets which were the basis on which the con- [fol. 1707] tract was made.

Mr. McClennen: I am urging your Honor——

The Court: By one of the alleged co-conspirators.

Mr. McClennen: I am urging your Honor that this paper goes into this record, when the exhibit goes in, as a contract signed by us. It has something attached to it physically now that wasn't there when we signed the paper, and I urge it should not go in with those things. The only attachment is a clip without the slightest evidence of who put that clip on, and a record——

The Court: Assuming it wasn't accepted——

Mr. McClennen: It will overcome one of the objection because it won't then appear that we signed these deal sheets. The record will indicate, if that isn't done, that we signed these deal sheets. The clip is a loose clip, and there is nothing whatever to indicate that on the files of Warner, when these were picked out, that these papers were attached and the difference or discrepancy in date

of nearly a year suggests the improbability that they were attached.

The Court: The witness has given some explanation of [fol. 1708] that.

Mr. McClennen: But nothing that would indicate that this contract, which we signed and put on the Warner files, had those deal sheets attached.

The Court: Well——

Mr. McClennen: He does not testify that he attached deal sheets to contracts when he sent them forward.

The Court: There might be some merit in your claim it was not a part of the contract.

Mr. McClennen: I urge that that be not left attached to the contract when it is marked as an exhibit.

Mr. Wright: If the Court please, the manner in which these were identified has not been stated correctly. These deal sheets were plainly marked at the time this contract and the time the witness who identified it, Mr. Doherty, was on the stand, this contract is marked Plaintiff's Exhibit for identification No. 568. These two sheets were then physically attached and are marked Plaintiff's Exhibit No. 568 (2) and Plaintiff's Exhibit for identification 568 (3). They were all attached together as one. They are three [fol. 1709] pages, one three-page exhibit. The first page consists of this contract. The second and third pages consist of these deal sheets. Now, the deal sheets, of course, don't purport to be signed by any representative of Schine. We don't make any such claim. The witness has testified, and it appears from their face that they are the work sheets from which the contract was made up and that the sheets came to his office and after the contract was returned approved in New York and returned to him, it also came to his office. Now, there is no reason whatsoever for separating the exhibit at this time.

The Court: Whether they are attached or not doesn't make any difference as long as they are referred to as separate exhibits, 568-A, B and C, whatever they are.

Mr. Wright: They are all part of records which were kept there.

The Court: It seems to me it is immaterial one way or the other, whether they are attached, or they are not attached. The testimony in the case does attach them, and [fol. 1710] the testimony of this witness.

Mr. Wright: Exactly.

Mr. McClennen: If your Honor please——

The Court: The mere fact they are attached together here is of no significance here if they are marked as separate exhibits. I presume that is a matter of convenience that these are in court for interrogation. He says these are deal sheets which originated in the execution of this contract and they are said to be properly grouped. They are marked separate exhibits. It isn't claimed anything in the contract itself said anything about these deal sheets. That is true. [fol. 1711] If those are left physically attached they will be left in a physical attachment which Mr. Doherty did not make, which no witness has made, and there is no testimony that anybody did make that physical attachment.

The Court: I do not think it makes any difference because the contract itself does not refer to them. They are marked separate exhibits and they will be considered in connection with the testimony of this witness. They have got to be considered together; I mean as something originating in this contract. I see no harm or no benefit except convenience in their attachment. They are not one exhibit. That is the answer.

Mr. McClennen: What I am fearful of is that this sort of an exhibit will be picked up at a later time bearing our signature and have physically attached to it something that was not there when we signed it.

Mr. Wright: There is no claim that these were there when you signed it.

The Court: I do not think there is any merit to your [fol. 1712] objection. I do not think it makes a particle of difference whether they are attached or whether they are not.

Mr. McClennen: There are very distinct and separate objections to those exhibits that do not apply to the contract itself.

The Court: Relate your objections to these separate proposed exhibits.

Mr. Wright: Perhaps we can solve the problem by taking the clip off (removing clip). They are marked as separate pages of the one exhibit.

Mr. McClennen: The contract then will become Exhibit 568 alone?

The Court: Whatever the mark is there.

Mr. McClennen: That is the way that it is marked for identification. As to the deal sheets, I urge upon your Honor that these deal sheets are not admissible in this case. They contain various narratives and computations concerning other theatres, not the one to which this contract relates, and they bear a date ten months away from the contract. They are not in any respects, I submit, admissible against these defendants, apart from these general objec- [fol. 1713] tions that have been urged already.

The Court: What do you say about the reference to separate theatres?

Mr. Wright: I think the witness can clear that up.

By Mr. Wright:

Q. I see under the heading "Remarks" at the bottom of the first sheet here, 568 (2), the statement appears: "1935-36 Colonial Theatre" and then terms below it. What does that refer to?

A. It was a comparison between the Civic and Roxy deal and the Colonial deal.

Q. That reference under "Remarks" is to this contract Exhibit 635-A, is it?

A. Yes, sir.

Mr. Wright: I think if your Honor can see the sheets, the deal is at the top, and under "Remarks" is simply a reference to the prior deal for comparison.

Mr. McClennen: Your Honor will observe that there is a lot of material on there not a statement of this deal, but a statement of prior transactions which are only, so far as we are concerned, hearsay, and if those sheets go in we get into the record things by hearsay evidence that [fol. 1714] serve no other purpose. There is no question but what the contract itself was the one which we made and stated the terms of the contract which was made, and what led this witness to forward the contract to us for execution I submit has nothing to do with this case.

Mr. Rogers: I think your Honor should have Exhibit 568 before you. That is the contract (handing to Court). At the top your Honor will see Civic and Roxy on Exhibit 568.

The Court: It was only for the purpose of comparison. How would this be material—the contract?

Mr. Wright: That was the existing first-run account of Buck. Always, I suppose, when a deal is made for the next

season a distributor in working it out makes a comparison with the deal he has then got in effect.

The Court: My point was whether this was material, the contract made with reference to Colonial. What significance has that here?

Mr. Wright: Again, for purposes of comparison, to show that the deal they actually had with Colonial was a better deal than the one they made with Schine for the next season. [fol. 1715] The Court: The deal sheet purports to show the terms for the purpose of comparison.

Mr. Wright: Yes, that is right.

The Court: Let me understand about this again. Did you make up these deal sheets in the first instance?

The Witness: No, sir.

The Court: They were made up by the Warner Company?

The Witness: Yes, sir, they were forwarded to me, a copy of that deal sheet.

The Court: I mean these deal sheets in the form in which they have been referred to as exhibits marked for identification here are in the form that you received them from the Warner Company?

The Witness: Yes, that is right.

The Court: And preceding that the application had been made?

The Witness: No, sir, the deal is made by our New York executives in Gloversville or in New York and it is worked out on the deal sheet and the deal sheet was forwarded to me to make up the application. I had nothing whatever to do with making the deal. I was not in on the negotiation at all.

The Court: Did the application follow the terms of the [fol. 1716] deal sheet?

The Witness: Yes, sir. I drew the application from that deal sheet.

The Court: And the contract recorded also the figures on the deal sheet?

The Witness: Yes, sir.

Mr. Wright: If the Court please, I think it should be clear that the application is simply a contract signed by the applicant. They are not different documents.

The Court: The application is based on the deal sheet that is submitted to you?

The Witness: That is right.

The Court: You got the application made out by the theatre operator or owner?

The Witness: Yes, sir.

The Court: And then it is forwarded for signature to Schine?

The Witness: Yes, sir.

Mr. McClennen: If your Honor please, I should call this further to your attention to avoid any chance of misunderstanding. We have had in the case at least identified deal sheets which were the contracts themselves. That is, signed deal sheets. The witness here is using these only in the [fol. 1717] sense of work sheets for the make-up from which the contract would be drawn. This shows that these are memoranda, according to his latest testimony, in the New York office. We have no evidence whatever of who made them or whether he knew the facts that he put down on the sheets. This witness did not have to do, according to this testimony, with the make-up of the deal sheets in any way. I submit, for that additional reason, that they are not admissible at all.

The Court: If it is not a sheet procured from one of the alleged co-conspirators it clearly would be incompetent. The witness has definitely stated that the deal sheets identified here are the basis for the application, that the application is based on these figures.

Mr. McClennen: It does not even appear in this case, if your Honor please, that there was any application. There was some transaction in New York City between the negotiator for the Schines and the general headquarters man of [fol. 1718] Warner's, whoever he was, in New York. It does not even appear that there was before them any application.

The Court: You said an application was made some eight months subsequent to the date of these deal sheets, didn't you?

Mr. McClennen: I am sorry that I gave such an impression because I certainly did not intend to say anything of the kind.

The Court: You spoke of one being eight months preceding.

Mr. Wright: Here is the contract, which, of course, is the same. The application is on the contract form.

Mr. McClennen: The sheets are dated December 31, 1935, and the contract is dated October, 1936.

The Court: The application develops into a contract, does it not?

Mr. McClennen: In the sense that at some time this witness sent to the Schine office——

The Court: A paper signed by the applicant, this contract here?

Mr. McClennen: To be signed by them and to be signed by the company. Whether it was signed by the company in this instance before it was signed by Schine does not appear.

The Court: That would not be material, would it?

[fol. 1719] Mr. McClennen: I think not, but it would bear on this matter of whether there was an application precedent to the contract which was based on these deal sheets of which we never knew anything.

The Court: I do not get the distinction you make. You say it was a contract first signed by the company and later signed by the purchaser. He claims that these deal sheets relate to this particular instrument, Exhibit 568.

Mr. McClennen: But they have nothing to do with us. This is the contract.

The Court: They do in this sense, as I have pointed out: They come from the Company, the alleged co-conspirator, and it is a part of the process, of the procedure by which the contracts in question here evolve.

Mr. McClennen: That, of course, brings up a far deeper question. There is no evidence that there was any co-conspirator.

The Court: Overruled. They are all marked separately, are they not, A, B and C?

Mr. McClennen: The deal sheets, so-called, one of them bears at present Plaintiff's Exhibit 568 (2) and the other [fol. 1720] Plaintiff's identification 568 (3).

(The contract referred to, previously marked as Plaintiff's Exhibit 568 for identification was received in evidence.)

(The deal sheets referred to, previously marked as Plaintiff's Exhibits 568 (2) for identification was received in evidence.)

(The deal sheets referred to, previously marked as Plaintiff's Exhibit 568 (3) for identification were received in evidence.)

Mr. Wright: I think Plaintiff's Exhibit 563 for identification and 635-B for identification should also be marked in evidence.

Mr. McClennen: To those, if your Honor please, there is the general objection.

The Court: What do these purport to be?

Mr. Wright: Exhibit 635-B is a contract about which I was now going to question Mr. Mooney, between Schine and Vitagraph, for a repeat run at the Civic or Roxy Theatres, about which I was going to question Mr. Mooney. I had offered it and I understand it had been received, and I just asked the reporter to mark it, along with Exhibit 563.

[fol. 1721] Mr. McClennen: Exhibit 635-B then goes in evidence, over our objection, if your Honor please.

The Court: Yes.

Mr. McClennen: The same objection to Exhibit 563.

(The paper referred to, previously marked as Plaintiff's Exhibit 563 for identification was received in evidence.)

(The contract referred to, previously marked as Plaintiff's Exhibit 635-B for identification was received in evidence.)

By Mr. Wright:

Q. Now, I call your attention, Mr. Mooney, to this contract marked as Exhibit 635-B, between Schine and Vitagraph for the Civic or Roxy, which has the language after the printed word "run", the statement "Repeat". Can you tell the Court what that means?

A. The picture is to become available 60 days after first-run. It means 60 days after the Colonial Theatre had completed their run of their pictures.

Q. I asked specifically for the term "Repeat".

A. "Repeat" means a second-run or a subsequent run in a town.

Q. That is, those pictures covered the same half that had been sold to the Colonial for first-run?

A. Yes, sir.

[fol. 1722] Q. As I understood you, that contract then gave Schine the privilege of repeating those pictures at the Civic or Roxy?

A. Yes, sir.

Q. In other situations in your territory where Schine

played your pictures first-run during that season did you extend to independent exhibitors the privilege of playing the features Schine played first-run on a repeat or second-run?

Mr. McClennen: That is objected to. If this were admitted it would involve, to test its accuracy, the trial of every theatre in his territory and the investigation of the contracts of each one of those theatres and the reasons why there was not a repeat run sold in those places, and the question whether in the other places there was a request for a repeat run, and as many separate trials, really, as there are separate theatres in this man's territory.

The Court: Read the question.

(Question read.)

The Court: I will let him answer. State the fact. You mean by independents any companies other than Schine?

[fol. 1723] Mr. Wright: I mean by that small theatre operators who were operating theatres in competition with Schine in Schine towns.

The Court: What do you mean by small theatres?

Mr. Wright: I would say by independent I mean theatres which were not affiliated either with Schine or with one of the major distributors. I think that will clarify it.

Mr. McClennen: I submit that that amendment makes the question still more objectionable.

By Mr. Wright:

Q. How is the term "independent exhibitor" used in the trade?

A. Just "independent exhibitor".

Q. Independent in what sense?

A. An exhibitor is the theatre owner. He is called the exhibitor.

The Court: Independent, what does that mean?

The Witness: That is not connected with this large circuit of theatres.

The Court: Does he show the pictures?

The Witness: An independent exhibitor is a man who owns one, or possibly four or five, theatres, not more than five theatres, who exhibits pictures the same as any other theatre.

[fol. 1724] The Court: All right.

By Mr. Wright:

Q. Now, will you answer the question?

The Court: Did you offer these to independent companies in your district?

The Witness: During the year 1937 I could not state, but there was a period of time that we were not permitted to offer our product second-run in any Schine situation.

Mr. McClennen: That is objected to as not responsive to the question.

The Court: Strike it out.

[fol. 1725] By Mr. Wright:

Q. I asked the question specifically with reference to the 1935-36 or 1936-37 season, which I believe was the season, was it not, which was covered by this repeat run contract that then applied, as Exhibit 635-B?

A. I could not definitely state that we did or did not that year.

Q. Well, can you recall any situations now where you did during that season?

A. No, sir.

Q. Calling your attention—strike that out. Were you familiar with those, the general characteristics of those three theatres in Fostoria, the Civic, Roxy and the one that was first called the Colonial and then the State?

A. I believe so.

Q. Which of those was the largest theatre?

A. The Colonial.

Q. That is the same as the State?

A. The State Theatre now.

Q. Do you know which one was the newest?

A. The Civic.

Q. Do you know about how many years those theatres had been in the town there?

A. No, I couldn't say.

[fol. 1726] Q. They had been there all the time that you were managing the Cleveland Exchange?

A. No, the Civic was built during the time I was managing the Warner Brothers.

Q. Do you know what the relative sizes of the Civic and State were?

A. No, I wouldn't say.

The Court: Relative sizes?

Q. I mean, do you know the sizes other than the fact that the State was the larger?

A. I believe the Colonial was the largest of the three houses, or the State Theatre.

Q. Calling your attention to the Cities of Kent and Ravenna, Ohio, do you know what theatres were operating there during the year 1936?

Mr. McClennen: In which?

The Court: In which?

Q. Well, let us take Kent, Ohio.

The Court: Kent, Ohio, or Canton?

Mr. Wright: (Spelling) K e n t.

The Witness: The Kent Theatre and Opera House.

Q. That was served out of your territory?

A. Yes, sir.

Q. And who operated the Kent?

A. Mr. Flannigan and Earl Steele.

[fol. 1727] Q. And the Opera House?

A. John Palfi.

Q. And in Ravenna what were the theatres?

A. The Ravenna and, I believe, the Ohio.

The Court: That is the only one?

The Witness: The Ravenna Theatre, Ravenna, and Ohio Theatre.

Q. Who operated those theatres?

A. Mr. Flannigan and Steele.

Q. Now, calling your attention to the—strike that out. Those towns were within your Cleveland territory?

A. Yes, sir.

Q. And you had been serving them with pictures?

A. Yes, sir.

Q. Do you remember for how long?

A. A good many years.

Q. That is prior to the 1937-38 season?

A. Yes, sir.

Q. Now, did your pictures—did any of your feature pictures play in those two towns during the months of September, October and November of 1937?

A. No, sir.
Q. Why not?
Mr. McClennen: That is objected to.

The Court: Do I understand your answer to be that none [fol. 1728] of them were operated in that period of time?
Mr. Wright: They were all in operation.
The Court: What was the question, then?
Mr. McClennen: It doesn't appear they were.
Mr. Wright: All right.

Q. During the period of the fall of 1937, what theatres were being operated in Kent?
A. The Kent Theatre.
Q. The Opera House was closed?
A. I believe it closed around September, 1937.
Q. Do you know who owned it then?
Mr. McClennen: That is objected to.

The Court: Well, if he knows.
The Witness: Schine.
Mr. McClennen: If your Honor please, he could not know ownership, couldn't possibly.
The Court: Well, I don't know.
Mr. Wright: Well, I will read into the record the answer to interrogatory No. 17-A.
Mr. McClennen: May this be stricken out?
The Court: Yes.
Mr. Wright: Page 13, which states that the 100 per cent interest was acquired in the Opera House at Kent in the month of June, 1936.
[fol. 1729] Mr. McClennen: Not ownership.
Mr. Wright: Well, they acquired the lease on the theatre.
Mr. McClennen: But the witness was asked about ownership.

By Mr. Wright:

Q. Now, during the 1936-37 season, where did your pictures play in Kent?
A. They did not play.
Q. I said during the 1936-37 season?
A. 1936-37 they played the Kent Theatre.
Q. That is first-run?
A. Yes, sir.
Q. And did any of them—when did the 1937-38 season begin, approximately?

A. September.
Q. Of 1937?
A. Yes, sir.
Q. And after the commencement of that season, did you serve the Kent Theatre with any 1937-38 season releases during the months of September, October and November?
A. Yes, sir.
Q. 1937?

The Court: Either in the Kent, you didn't?
The Witness: We didn't serve, there wasn't any of Warner First National Pictures played in September, October or November, and I believe December.
[fol. 1730] Q. Why was that?
Mr. McClennen: That is objected to.
The Court: Sustained. State the facts about it, not the conclusions.
The Witness: During the selling season, which usually started in the end of May, I tried to negotiate a deal with Mr. Steele, who was doing the buying for the Theatre, and we were not able to get together on terms. A little later on I had instructions from our New York office not to sell the account at Ravenna or Kent.
Mr. McClennen: May that be stricken out, it could not have been oral instructions for one thing.
The Court: Were the instructions in writing?
The Witness: That I couldn't say. I believe it was over the telephone.
The Court: What?
The Witness: Long distance telephone.
The Court: These talks are important.

By Mr. Wright:

Q. Do you remember who gave you the instructions?
A. It was either Mr. Mochrie or Mr. Smith.

Mr. McClennen: Just a moment, your Honor is admitting this telephone conversation?
[fol. 1731] The Court: No, who is Mr. Smith or Mr. who——
The Witness: Mr. Robert Mochrie.
The Court: Who are they?
The Witness: Mr. Smith was Eastern Sales Manager and Robert Mochrie was his assistant.

The Court: Do you remember the talk with him about this situation here?

The Witness: I don't remember the conversation except that he just told me not to negotiate any deal for those two towns.

By Mr. Wright:

Q. Can you fix the approximate date of that conversation?

A. I believe it was around September, the last of August or the first of September.

Q. You believe that was over the long distance telephone from New York?

A. Yes, sir.

Q. After you received those instructions did you have any conversation with Mr. Steele about the product for the Kent Theatre?

A. Yes, I talked to him on several occasions and he complained that——

Mr. McClennen: Just a moment.

Q. Where were those conversations?

A. In my office.

[fol. 1732] Q. At Cleveland?

A. Yes, sir.

Q. What was said there?

Mr. McClennen: Our general objection, if your Honor please.

The Court: Received.

The Witness: He said he was unable to get any product for the theatres.

Mr. McClennen: In view of the answer I move to strike it out.

The Court: Strike it out.

Q. What was said in reference to the—what, if anything, was said with reference to obtaining the product of your company for the theatres?

Mr. McClennen: Same objection.

The Court: Let him state that.

The Witness: He was ready to negotiate a deal, and I had to advise him—I stalled him off for some time, and later advised him I wasn't permitted to make a deal.

Mr. McClennen: I ask that that be stricken out.

The Witness: Strike it out in that form.

Q. Just tell us what you did. Don't characterize it or tell us the reasons for it. Tell us what was said, as near as you can recall, the substance and what these conversations were.

[fol. 1733] Mr. McClennen: Objected to.

The Court: Overruled.

The Witness: I finally had to admit to him that I wasn't in a position to negotiate a deal for the two towns.

Mr. McClennen: I move to strike it out.

The Court: Finally admitted to him, you stated to him you could not make a deal, is that what you mean?

The Witness: Yes, sir.

By Mr. Wright:

Q. What had you been telling him in the prior conversations?

Mr. McClennen: That is objected to.

The Court: Overruled.

The Witness: I just don't recall the conversations excepting during the May, June and July period.

Q. I am referring to the period after you got instructions not to sell.

A. I am trying to lead up to it. To the best of my recollection, we were not able to get together on the deals. I continued to ask for the same terms for quite some time, and then when he was ready to negotiate I was unable to sell him.

Q. Those instructions you got, did they relate to the theatre in Ravenna, as well as Kent?

[fol. 1734] A. Yes, sir.

Mr. McClennen: That is objected to.

The Court: Sustained. It is a conclusion. State the fact.

Q. During the 1936-37 season, had you been serving the theatres that Mr. Steele bought for in Ravenna with Vitagraph product first-run?

A. Yes, sir.

Q. And did you, when you negotiated with him, or had these conversations about product, did they relate to one town, or both?

A. Both towns.

Mr. McClennen: That is objected to.

The Court: What was said, what was said in this conversation? Then we can tell what it related to. A little while ago you said it was not to make any negotiations with Kent. Let us have the whole conversation.

The Witness: Well, the conversation was regarding Kent and Ravenna, not only the one town. Mr. Steele bought for both towns.

Q. I think the Judge was inquiring as to the conversation you had over the telephone with Mr. Smith, or who was it, Mochrie, you said?

The Court: The question before related to your question [fol. 1735] when you inquired as to the conversation directed to Kent.

The Witness: Pardon me. The same conversation related to Kent and Ravenna.

Q. And then did you serve any of your 1937-38 releases to the theatres in Ravenna during the months of September, October and November, 1937?

A. No, sir.

Mr. Wright: Now, I want to read the answers to the interrogatory Question 17-A, at page 13, from which it appears that the defendants acquired the Kent Theatre at Kent in December of 1937, and also acquired the Ravenna and Ohio Theatres at Ravenna in December, 1937.

The Court: It doesn't include the Opera House?

Mr. Wright: They already had the Opera House, that I read in, was acquired in June, 1936.

The Court: It would be December, 1937, December, 1937 is your interrogatory?

Mr. Wright: That was the last three acquisitions. The Opera House had been acquired in June, 1936.

The Court: The other two were acquired in December, 1937?

[fol. 1736] By Mr. Wright:

Q. Were any facts brought to your attention by any one indicating that it would not be desirable for the company to serve the pictures of the 1937-38 season in those towns during the period mentioned?

Mr. McClennen: Objected to.

The Court: Sustained in that form.

Q. Calling your attention to Town of Medina, Ohio, were you familiar with the theatres that were operating there in the year 1936?

A. Yes, sir.

Q. What theatre was operating there then?

A. The Princess Theatre.

Q. Do you know who was operating it?

A. Mr. Yulowitz and Mr. Willis.

Q. Do you know how long—was that the only theatre there?

A. Yes, sir.

Q. Do you know how long they had been operating that theatre?

A. At least 15 years or more.

Q. Were you then selling them your Vitagraph product?

A. No, sir.

Q. Had you tried to?

A. Yes, sir.

The Court: You mean then; you mean in 1936 or any time [fol. 1737] during the 15 years?

Mr. Wright: No, I am talking about 1936.

Q. Had you been soliciting them each season?

A. Yes, sir.

Q. And how long had you been out of the town?

A. Six or seven years.

Q. That is, during that period there had been no other theatre there?

A. Yes, sir.

Q. And you hadn't been able to make a deal with the Princess?

A. That is right.

Q. What kind of a theatre was that.

A. It was a small house, I would say around 350 seats.

Q. Do you know how old it was?

A. Must have been at least 20 years old.

Q. Then do you know whether there was any other theatres there in the year 1937?

A. In 1937 I believe they started building a new theatre in the town.

Q. Construction was started, do you remember about when?

A. I believe it was the early part of 1937.

Q. And can you recall who was building it?
A. Mr. Fine and Mr. Essick.

The Court: What are those names?
The Witness: Fine and Mr. Essick.

[fol. 1738] Q. Prior to the time they began construction of that theatre did you have any conversation with those gentlemen about Warner Brothers for Medina?
A. Yes, sir.
Q. About when was that?
A. I believe it was around December, 1936.
Q. And where did it occur?
A. In my office, Cleveland.
Q. Who else was present?
A. Mr. Kalmenson.
Q. Were both Mr. Fine and Mr. Essick and who——
A. No, just Mr. Essick.
Q. And what was said then?

Mr. McClennen: This is objected to on the ground that this conversation has no relation to this case in any way, there was no authority in the witness to have any conversation with these men in the course of the business of the Warner Company. They were not engaged in the operation of any theatre in Medina at the time, and it will appear, I think, indisputably they were not engaged in a theatre in Medina for more than a year after December, 1936. Therefore, this could not be a conversation affecting the Warner [fol. 1739] Company, and obviously not one affecting us in any way.

The Court: Who was this man Kalmenson you refer to?
The Witness: Mr. Kalmenson at that time was Central District Manager for Warner Brothers.
The Court: Overruled.

By Mr. Wright:

Q. State what the conversation was as near as you can recall.

A. Mr. Essick came into my office. Mr. Kalmenson was sitting there. Mr. Essick inquired whether or not we had sold our pictures in the Town of Medina. I told him we hadn't sold Medina in six or seven years, and he advised us he and Mr. Fine were planning on building a theatre in Medina and wanted to know whether or not he could count

on Vitagraph products for that city. Mr. Kalmenson spoke up and said definitely they could count on that product for the City of Medina. Mr. Essick advised me he would let us know in a week or ten days whether or not they were definitely going through with their plans.

The Court: I thought you said they started to build in 1937.

The Witness: That is true. This was around December, 1936, when he stopped in the office.

[fol. 1740] Mr. Wright: Before they began to build.

Mr. McClennen: Now that the contents of the conversation has been heard, I move that it be stricken out.

The Court: No, I will see what follows:

The Witness: Mr. Essick left the office and in about a week or ten days later he advised me he was definitely going through with this plan to build a theatre. I notified Mr. Kalmenson that Mr. Fine and Essick were going to build this theatre in Medina and reminded him of his promise.

Mr. McClennen: That is objected to.

The Court: I don't think it is very material. Strike it out. I will strike it all out.

Mr. Wright: We will have Mr. Fine and Mr. Essick on the witness stand.

The Court: Strike it out.

[fol. 1741] By Mr. Wright:

Q. Do you recall the next time you talked to Mr. Essick about the Vitagraph product for his theatre there at Medina?

A. Yes, I talked to him, I believe, in the fall of 1937.

Q. Where was that conversation?

A. In my office.

Q. Who else was present?

A. I don't recall any one being present.

Q. Except you and Mr. Essick?

A. Yes, sir.

Q. What was said then?

Mr. McClennen: This is under our objection.

The Court: Overruled.

A. I believe it was just a discussion during the process of the building of this theatre. We did not sit down and work out any terms for the deal.

Q. As the theatre was still under construction then?

A. That is right.

Q. Then after that did you have any further conversation with him about your product for the theatre at Medina?

A. Yes, I heard from New York that they had sold the Product to Mr. Schine for the Princess Theatre.

Q. Then after that you talked to Mr. Essick?

A. Yes, sir.

[fol. 1742] Q. And what did you tell him?

A. I told him——

Mr. McClennen: The same objection.

The Court: I will let it stand.

A. I told him that it was impossible for me to negotiate a deal for their house.

Mr. McClennen: These conversations apparently having been concluded now, I make the specific objection that it was not within the authority of Mr. Kalmenson to give any assurance *with* Mr. Essick could have the product, as that was wholly in the control of the company itself, and therefore that that statement should be stricken out, in addition to the various other reasons that we have already assigned.

The Court: Does it appear that the division managers had the authority to make contracts?

Mr. McClennen: It appears that they did not. The authority to make the contract was in the headquarters men. I think it was Mr. Seras in this case, but I am not sure at the moment of the name. But it clearly appeared that it was only the general sales manager that could obligate the [fol. 1743] company in any way for the product.

Mr. Wright: If the Court please, we are not concerned here with whether or not there was authority to make the contract. For our purposes it is immaterial whether or not a binding contract was actually made or not. This is not a suit by any of these parties to recover on a contract. All we are showing here is what the course of the dealings here were between these exhibitors and the Warner Company. This conversation, of course, is necessary to show what these were.

The Court: I assume that the district managers would have authority to make such statements.

Mr. Wright: I submit, if the Court please, there is nothing in the record at all which would indicate that he didn't have

authority to make such a statement. The most that can be said for the record is that he did not have the authority to approve a license agreement; that is his duty and it is Mr. Mooney's duty, of course, to talk to prospective customers at all times.

The Court: The authority to say "I won't make a con- [fol. 1744] tract" or "I will make a contract" rests somewhere. Did the division manager have authority——

Mr. Wright: If we were trying to prove, if the Court please, that a contract was made, that would be a different matter. All we are proving is what happened, in fact that this assurance was given.

The Court: Somebody in the company gave that assurance?

Mr. Wright: Yes, that is all that we offer the testimony for.

The Court: Unless it is connected up further it may not be competent.

Mr. McClennen: The situation, if your Honor please, at the time of this alleged conversation was that Warner had no outlet in Medina and obviously product was available as long as that situation continued, but that did not give the man an authority to commit his company, and when he made a statement, if he made such a statement, which purported to commit the company, it was just the same as if a street car conductor on the sidewalk had given the assurance that it was not the company's act in any way, and it [fol. 1745] was not in any way binding on the company or indicative of what the company ought to do. And manifestly it was not an act in any way related to this alleged conspiracy of which there has as yet been no evidence. As a matter of fact, it is perfectly clear that the Schine interests were not in the town at all at the time of this conversation. Mr. Yulowitz and Mr. Willis were the other operators there and it appears that they would not buy the Warner product although they had been solicited to do so, so that this statement has no bearing whatever on the case that we are trying, I submit.

The Court: Of course that goes to the effect of the statements.

Mr. Wright: Precisely, your Honor.

The Court: I will receive it. I am not sure whether these things should not be connected more than they thus far have been.

Mr. Wright: I will ask to have this folder which is within the folder which is marked Exhibit 635 for identification and contains four contracts relating to Medina, Ohio, [fol. 1746] marked as Plaintiff's Exhibit 635-C for identification.

(The folder within folder Exhibit 635 for identification was marked as Plaintiff's Exhibit 635-C for identification.)

By Mr. Wright:

Q. I will hand you the contract between the Belpik Theatre Corporation and Vitagraph, dated October 13, 1937, for the exhibition of features at the Princess Theatre, and ask you if you have seen that before?

A. No, sir. I don't recall ever seeing that contract before.

The Court: You claim that Schine acquired the Princess Theatre when?

Mr. Wright: I will read into the record the answer to interrogatory No. 17, which shows that a 25% interest in the Princess Theatre was acquired by Schine in September, 1937.

The Court: He says he does not remember seeing that.

By Mr. Wright:

Q. As I understood your previous testimony, you were advised that the pictures had been sold in Medina to Schine some time in the fall of 1937; is that right?

A. Yes, sir.

Q. At the time——

Mr. Rogers: No, that is not his testimony. He merely [fol. 1747] says that some time later he talked to New York and they said they sold the product to Schine for the Princess, but he did not fix any date.

Q. When was it that you learned that it was sold to Schine, as nearly as you can recall?

A. I believe it was September, 1937.

Q. At that time, or after that time, was a contract received by your office which embodied the terms of the deal?

A. I don't recall ever receiving that contract.

Q. You left the company when?

A. The first week in January, 1938.

Mr. Wright: You may cross-examine.

The Court: We will suspend now until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 1748]. After Recess, 2 P.M.

Appearances: Same as before noted.

MILTON A. MOONEY resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Cross-examination.

By Mr. Rogers:

Q. Mr. Mooney, you testified that in 1924 to 1931 you operated the Strand, the Opera House and the Majestic theatres; is that accurate?

A. I operated them, yes, sir.

Q. By that do you mean that in that period from 1924 to 1931 those three houses were actually open and in operation during that period?

A. Not for the full time, no, sir.

Q. During that period did you open or operate the Majestic Theatre at all?

A. Yes, during Fair week.

Q. When you say "during Fair week" just what do you mean by that?

A. During the County Fair of Logan County we would open the three houses full time.

Mr. Wright: If your Honor please, I think this is beyond [fol. 1749] the scope of the direct. I do not know what the purpose is. We did not go into any period from 1924 to 1931. This was before Schine came into the town. There was nothing that relates to any issue in the case that was covered during that period that I know of.

The Court: Objection overruled.

Q. I am just directing my interrogation to the Majestic Theatre.

A. That was opened during Fair week on a number of the Fairs. It was not open during the entire seven years.

Q. Was it open at any time during an entire year from 1924 to 1931?

A. No, sir, not for the entire year.

Q. Was it open for any portion of each of those consecutive years of 1924 to 1931 at any time?

A. Yes, sir.

Q. Every one of those years?

A. Not every year, no, sir.

Q. What years was it closed entirely?

A. I believe it was closed the last two or three years that we had the lease.

Q. That is, by that you mean——

A. The Majestic Theatre.

[fol. 1750] Q. That is, by that you mean that in 1928, 1929, 1930 and 1931 it was closed?

A. Somewhere along in through there, yes.

Q. It was not in operation at all?

A. No, sir.

Q. When you talk about that being open for Fair week, does Fair week mean a week or does it mean a few days?

A. Seven days. Six days, rather. The house was closed on Sunday at that time.

Q. This Majestic Theatre, just what kind of a house was that?

A. Very small. I believe it was around 250 seats.

Q. Was that a converted store show?

A. I would call it that, yes.

Q. About when was that theatre converted?

A. That was before I ever hit the town of Bellefontaine. I don't know. It was an old house.

Q. It was a little store show even when you got it; is that right?

A. Yes, sir.

[fol. 1751] Q. Now, with reference to the Opera House—May I ask you with reference to the Majestic Theatre, was sound equipment ever put in that theatre?

A. No, sir.

Q. It was not?

A. No, sir.

Q. Now, with reference to the Opera House, what kind of a house was that?

A. It was an old upstairs Opera House.

Q. And it was a very old upstairs Opera House when you got it, is that right?

A. Yes, sir.

Q. And it was about 75 years old, wasn't it, when you got it?

A. Approximately.

Q. And about how many seats did it have?

A. I believe it had around 680 seats.

Q. That is wooden seats?

A. Yes, sir.
Q. Was any sound equipment ever put in that house?
A. No, there wasn't.
Q. Now——

Mr. Wright: What was the answer?
Mr. Rogers: "No".
Mr. Wright: I take it he is answering with respect to the [fol. 1752] time he had it. He doesn't know, I suppose, what happened after 1931.
Mr. Rogers: I am talking about his operation now.
The Court: 1931, was it put in prior to 1931?
The Witness: No, sir.

Q. And when did sound equipment come in?
A. I would say—I don't know, possibly 1928, '27 or '28.
Q. Now, as a matter of fact——

The Court: I thought you said it wasn't put in prior to 1931?
The Witness: It was never put in the Opera House. The question I think he meant, when did sound become effective for the other theatres, when could I have put it in the Opera House Theatre.
The Court: When you could have.
The Witness: It was available, but I never installed it.

By Mr. Rogers:

Q. That applies also to the Majestic, it was available, but you never installed it?
A. Yes, sir.
Q. As far as the Opera House was concerned, you closed down the Opera House, too, didn't you?
A. Except fair weeks.
Q. You say fair weeks, how many fair weeks were there? [fol. 1753] A. One week a year.
Q. It wasn't fair weeks, it was just one week?
A. Yes, sir.
Q. Do you mean every year during the time you operated that theatre you opened that theatre for fair week up to the time you disposed of it?
A. I believe it was one or two years when we could get some kind of a stage show, vaudeville show. When sound came in we opened it for one week.

Q. Other than putting a stage show in for one week or a picture for fair week, is it fair to say the Opera House was closed?

A. The Opera House was opened on Saturday nights up until the time sound came in. After sound came in we closed the house permanently.

Q. Is it accurate to say from 1924 to about '27 you opened the Opera House only on Saturday nights?

A. With very few exceptions, with special pictures, such as the "Ten Commandments", or pictures of that caliber we have played at the Opera House a full week during any period.

Q. Take the years 1924 to '27, on an average per year, how many weeks per year did you operate the Opera House?

A. For the entire week, I would say possibly not more than five or six times, five or six weeks.

[fol. 1754] Q. Through that entire period?

A. That is right, per year.

Q. Later on, as you say, you operated only one week a year, is that right?

A. That is right.

Q. From 1927 to '31?

A. That is right.

Q. Now, let us come to the Strand, and what kind of a house was the Strand?

A. The Strand was built for a picture theatre on one floor, and I believe had about 480 seats. Just an ordinary—it was an ordinary theatre.

Q. And about how old was the Strand when you took the lease on it from Gutilla?

A. I believe it was about eight years old at that time.

Mr. Wright: I think Mr. Gutilla testified to the date he built it.

Mr. Rogers: I am interrogating Mr. Mooney, if you don't mind, Mr. Wright, and I want Mr. Mooney's cross-examination.

Q. An ordinary theatre seating about 400 seats on one floor, is that right?

A. 480, I believe.

Q. I beg your pardon, 480. Now, at the time you got all these three houses from Mr. Gutilla, you say you paid [fol. 1755] $15,000?

A. Yes, sir.
Q. Now, just exactly——

The Court: What did you say about the Strand, how long was that operated?
The Witness: The Strand was a strictly picture theatre. It was built for a theatre.
The Court: Was that run right along?
The Witness: Yes, that was open all the time.
Mr. Rogers: It was open all the time, he said.

Q. Now, I believe I asked you that when you acquired those three houses in 1924 from Mr. Gutilla, you testified that you paid $15,000?
A. Yes, sir.
Q. Now, will you tell me just what you paid that $15,000 for?
A. For the lease and equipment.
Q. For the leases?
A. Yes, sir.
Q. On the three houses?
A. Three houses.
Q. And for the equipment in the three houses?
A. No, the equipment for the Strand and Majestic and booth equipment for the Opera House. The seats belonged to the Opera House Company.
[fol. 1756] Q. Now, so far as the Opera House is concerned, you say all you bought was the booth equipment?
A. Yes, sir.
Q. And that was silent equipment?
A. Yes, sir.
Q. Now, with reference to the equipment that you bought in the Opera House, just what equipment did you buy in the Opera House?
A. Well, there would be the two projecting machines, screen, besides the booth equipment, the screen. Then I don't know whether they had a generator in there at the time, it was either a generator or a Mercury arc rectifier. I believe it was a Mercury arc rectifier; then, the rewinding machines and vaults for the film, the cans.

The Court: Was there a bill of sale enumerating the articles?
The Witness: Yes, sir.

[fol. 1757] Q. Now, with reference to the Majestic and with reference to the Strand, was that sale evidenced by documents?

A. Sir?

Q. Was that sale of this equipment and the sale of the lease to you, as you say, was that evidenced by documents?

A. Yes, sir.

Q. Bills of sale?

A. Yes, sir.

Q. Are you possessed of those documents?

A. No, I don't have them. Pardon me; I believe the court record down in Bellefontaine would have them. They were recorded at the time.

Q. Now, let me see: With reference to the Opera House, you did not pay for the seats?

A. No, sir.

Q. They belonged to the owner?

A. Yes, sir.

Q. And you did not get the box-office equipment, that belonged to the house too, didn't it?

A. There was nothing more or less than the box-office. There was no equipment in the box-office.

Q. Wasn't there a vending machine?

A. No, sir.

Q. No ticket-choppers?

A. No, sir. There might have been a ticket-chopper. [fol. 1758] That would have gone along with the theatre, with the equipment, but there was no ticket machine.

Q. Display sign?

A. That also went along with the equipment which I bought.

Q. You bought that too?

A. The portable one. It was not like the ones that are built into the walls.

Q. Electric sign?

A. There was no electric sign.

Q. Marquees?

A. No, I don't believe there was any marquee either. It belonged to the building, if there was.

Q. Then it gets down to the booth equipment and probably a ticket-chopper or two?

A. Yes, sir.

Q. And display signs and the screen; is that right?

A. That is all.

Q. When we come to the Strand Theatre: What equipment did you purchase from the Strand Theatre?

A. We purchased the booth equipment, the screen, seats, box-office equipment, and so forth, electric fans, and whatever happened to be in the theatre at the time. It is all enumerated in our bill of sale.

Q. So that in that sale the seats were included; is that right?

[fol. 1759] A. Yes, sir.

Q. At the time you made your sale in 1931 to Schine you had had the benefit of seven years of use, hadn't you, of this equipment?

A. Yes, sir.

Q. And at that time how much of an unexpired lease did you have on the Opera House?

A. I believe there was about three and a half years left on the lease.

Q. On the Opera House?

A. On the Opera House I can't say.

Q. As a matter of fact, weren't there only a few months left on the Opera House?

A. That I can't tell you.

Q. Let me see if I can refresh your recollection. You say that you made the sale about June of 1931. That is right, isn't it?

A. Yes.

Q. As a matter of fact, at that time didn't the Opera House only have until December 31st to run, of that same year?

A. That is very possible.

Q. At the time you made that sale what was the situation with reference to the Majestic Theatre?

A. It was closed.

Q. Did you have a lease on that house at all?

[fol. 1760] A. Yes, sir.

Q. How long did that lease have to run?

A. The same period as the Strand, which I believe had about three and a half years to run.

Q. You say as part of that deal the Schines took over the Strand and you assigned the Majestic to them as well?

A. Yes, sir.

Q. Are you sure of that?

A. Pretty sure.

Q. When you say you are pretty sure, are you absolutely sure you ever turned the Majestic over to them at all?

A. I know when I took the lease from Mr. Gutilla for ten years it included the Majestic and the Strand theatres. Now, whether during that last period he released me on that lease I couldn't be sure. I think we still had it under lease. I turned everything over I had in Bellefontaine to Mr. Schine.

Q. Regardless of whether you turned everything over or not, did you turn the Majestic Theatre over or hadn't you been released from the Majestic Theatre before that?

A. That I couldn't tell you. I thought we turned it over.

Q. Now, in that transaction what equipment was in the Strand Theatre?

A. The equipment I sold to Mr. Schine?

Q. Yes.

[fol. 1761] A. It was everything that I had obtained from Mr. Gutilla, plus the blower fan and sound equipment, and whatever replacements we had made in the theatre.

Q. Now, with reference to the Opera House, was there any equipment in the Opera House at the time you made the sale to Schine?

A. I believe there were machines. I believe the booth equipment was still in there. Whether they were taken out or not I don't remember.

Q. Now, as a matter of fact, hadn't you taken out the booth equipment out of the Opera House before you made the deal in 1931 with Schine, and hadn't you sold it?

A. Not to my knowledge, no, sir. I don't recall ever taking it out of there or I don't remember ever taking it out of the Majestic.

The Court: Was there a written bill of sale?

The Witness: Yes, the written bill of sale would show what we sold.

The Court: Does that enumerate the property sold?

The Witness: Yes, sir, it would be right in the bill of sale with Mr. Schine.

By Mr. Rogers:

Q. You mean that you did not sell the equipment in the Opera House before you made your deal with Mr. Schine?

A. I don't ever recall selling any equipment out of the [fol. 1762] Opera House Theatre.

Mr. Wright: Mr. Schine has the bill of sale. I do not see what the purpose of all this is.

The Court: I will receive it. It is cross examination.

Q. At any time were any one of these three theatres known as the Rialto Theatre?

A. I believe the old Majestic was known as the Rialto Theatre at that time.

The Court: At what time? Do you mean 1927 to 1931?

The Witness: No, before we took over the house.

By Mr. Rogers:

Q. That was before you took over the house?

A. That is right.

Q. Was it known as the Rialto after you took it over too for a short period?

A. No, sir, it was not.

Q. Was it ever known as the Rialto?

A. I believe it was, before we went in there.

Q. Do you recall having sold the electric sign on the Rialto Theatre?

A. Yes, to Belleview, Ohio.

Q. You personally?

A. Yes, sir. It was equipment that was not being used, to my knowledge.

Q. You sold that after you took over the Majestic [fol. 1763] Theatre, didn't you?

A. Yes, after we took over the leases for Bellefontaine.

Q. You sold that yourself, didn't you?

A. Yes, sir.

The Court: You changed the name, did you?

The Witness: No, the Rialto, I believe, was the name of the Majestic Theatre before we took it over. The sign was there. I don't know where it came from, but it was on the property.

Q. You were in court when Mr. Gutilla testified, weren't you?

A. Yes, sir.

Q. You heard his testimony, didn't you?

A. Yes, sir.

Q. Do you remember this testimony of Mr. Gutilla under direct testimony by Mr. Wright: he said: "You own the

Strand Theatre there?"—talking about Bellefontaine. "A. Yes, sir." "Q. How long have you owned it? Since 1916. You operated it as a theatre yourself, then? A. Yes, sir. Q. Until what time? A. Until 1924. Q. Then it was sold? A. I sold that to Mooney. Q. Mr. Milton Mooney? A. Milton Mooney. Q. That is, you sold the lease on the theatre? A. I sold the equipment and I gave him a lease on the theatre."

[fol. 1764] Now, is that testimony of Mr. Gutilla's accurate?

A. I think he meant that he sold me the lease on the equipment.

Q. I am asking you: Is that answer accurate, that he didn't sell you a lease, he merely sold you the equipment and gave you a lease on the theatre?

A. He sold me a ten-year lease including the equipment.

Q. Then that answer is not accurate; is that it?

A. I don't know. The bill of sale and the lease speaks for itself.

Q. Then his testimony is not accurate on that; is that right?

Mr. Wright: He owned the building. It is obvious that what he gave him was the lease. That is all he could give him.

The Court: He stated what the facts are.

Q. When you made your sale, as you say, to the Schines, you said you sold him the three theatres and you got $2,500 for the three theatres; is that right?

A. I got $2,500 for what I sold him, yes, sir.

Q. One moment. Didn't you testify that that was for the three theatres?

A. The leases; the leases and equipment.

Q. On three theatres?

[fol. 1765] A. Yes, sir.

Q. Is that accurate?

A. I believe so.

Q. Wasn't that transaction under which the sale occurred as between yourself and the Schines evidenced by a written document?

A. Yes, sir.

Q. Now, when you stated that you sold these theatres to Schine that was not really accurate, was it?

A. It is correct so far as my knowledge.

Q. As a matter of fact, those three theatres were operated by corporations, weren't they?

A. The Bellefontaine Amusement Company.

Q. And the corporations owned the property and not you; is that right?

A. That is right.

Q. Will you tell me if you recognize the handwriting on that piece of paper (handing paper to witness)?

A. Yes, sir.

Q. Whose handwriting is it?

A. Mrs. Mooney.

Q. That is your wife?

A. That is right.

Q. And she was the Secretary of the Bellefontaine Amusement Company at that time?

[fol. 1766] A. Yes, sir.

Q. At the time of the sale?

A. Yes, sir.

Q. And I show you these papers and these papers represent the documents that were used in connection with that sale, don't they?

A. No, sir, I never saw this document, I don't believe (indicating).

Q. Which one?

A. This one right here (indicating).

Q. That is the lease, you mean, this lease on top?

A. Yes, sir.

Q. It purports to be from Daniel Gutilla, lessor, to the Schine Enterprises. You never saw that document before?

A. No, sir.

Q. I show you this paper on the letterhead of the Bellefontaine Amusement Company. Have you seen that paper before?

A. Yes, sir.

Mr. Rogers: That paper that I am talking to you about I wish for a moment to have that marked for identification so that I can refer to it by identification number.

(Copy of resolutions of stockholders referred to marked Defendants' Exhibit D-43 for identification.)

[fol. 1767] Q. I show you this paper, bearing date July 28, 1931, between Daniel Gutilla, as lessor, and Bellefontaine

Amusement Company as lessee, and I ask you if you have seen that paper before?

A. Yes, sir.

[fol. 1768] Q. And the signature here of M. A. Mooney, President, is your signature, is it?

A. Yes, sir.

Mr. Rogers: I wish to have that for the moment marked for identification.

(Thereupon the document above referred to was marked as Defendants' Exhibit No. 44 for identification.)

Q. I show you this paper bearing date May 1st, 1933, and ask you whether you saw that paper before?

A. No, sir, I don't recall ever seeing that paper.

Q. But the two papers Defendant's Exhibit 43 for identification and Defendant's Exhibit 44 for identification were the documents that were signed by your company, the Bellefontaine Amusement Company, at the time of the sale to Schine of the three theatres, is that right?

A. Yes, sir.

Mr. Rogers: I now offer in evidence D-43 for identification.

(Document shown to and inspected by Mr. Rogers.)

Mr. Rogers: I don't understand the relevancy of it. I don't see that there is anything objectionable about it other than it doesn't appear to be material to any of the issues.

[fol. 1769] The Court: What is it, is it a bill of sale?

Mr. Rogers: This is the actual resolution on the transfer of the property.

The Court: It bears on the value.

Mr. Wright: What does it prove? It is already in evidence that he was paid $2500.

The Court: What was sold may have some bearing on what he paid for it.

(Document previously marked as Defendants' Exhibit No. 43 for identification is now received in evidence and marked as Defendants' Exhibit No. 43).

Mr. Rogers: I wish to read this Defendants' Exhibit No. 43.

The Court: Read the important part of it.

Mr. Rogers: That is all I am going to do.

"Copy of resolution of stockholders: We, the undersigned stockholders of Bellefontaine Amusement Company, Bellefontaine, Ohio, hereby consent to the sale of the furniture and fixtures in the Strand Theatre and the assignment of the lease therefor to the Schine Enterprises, Inc., for the sum of $2500 and waive the notice as provided in Section 8623-72 of the General Code of Ohio," signed by all the [fol. 1770] stockholders, "E. Mooney, Secretary."

Q. Now, I show you this Defendants' Exhibit 44 for identification and ask you whether that document refers to the Strand Theatre in Bellefontaine?

A. I don't believe it mentions the theatre, does it?

Q. It doesn't mention the theatre. That is why I am asking you, does it refer to the Strand Theatre?

A. It refers to our holdings in Bellefontaine, Ohio, which was leased to us by Mr. Gutilla.

Q. It talks about a definite holding there, that the lease expires on a certain date, doesn't it?

A. I don't see it here. I will read it.

Q. Go ahead, help yourself.

A. I don't see any theatre mentioned in here whatsoever. It is the termination of a lease the 30th day of June, 1931. I don't see any theatre mentioned there. Is there?

Q. You agreed to cancel a certain lease as of the 30th day of June, 1931. Wasn't that the lease of the Strand Theatre?

A. The lease of the Strand Theatre, I don't know, the lease of the Strand Theatre was turned over to Mr. Schine.

Q. Now, as a matter of fact, didn't Gutilla make a new lease on the Strand Theatre with Mr. Schine for the unexpired term of the Strand Theatre, and isn't that the trans-[fol. 1771] action instead of having made an assignment of that lease to Mr. Schine?

Mr. Wright: If the Court please, he isn't competent to testify to what Mr. Gutilla did.

The Court: He can state whether he knows. He can state his knowledge of what was done, if that lease was signed for the balance of the time by the owner of the property.

The Witness: According to that document I would say that Mr. Gutilla made a lease with Mr. Schine. I didn't recall it at the time, but I believe that must be correct.

Q. Didn't you agree to cancel the lease on the Strand Theatre so Mr. Gutilla could make a lease with Mr. Schine?

A. That is true.

Q. That is true?

A. I didn't recall that, but that is true.

Q. Isn't that what this Exhibit No. 44 established?

A. That would be, I think, the Majestic and Strand. I believe we had the both houses under lease for the same period of time.

Q. That is your belief about the Majestic?

A. Yes, sir.

Q. But you are not sure about that?

[fol. 1772] A. I wouldn't swear to it.

Mr. Rogers: I ask to have Defendants' Exhibit No. 44 for identification now made Defendants' Exhibit No. 44.

Mr. Wright: It isn't clear yet what it is, if the Court please.

The Court: According to his statement here it indicates that the lease was given directly by the owner to the Schines.

Mr. Wright: What significance does that have.

The Court: It bears, as I said before, on the adequacy of the consideration. If he pays $2500 for several leases, and some others it might seem entirely inadequate. For a few articles, it might seem perfectly adequate.

Mr. Wright: I was talking about the first document. It appears from the first document the stockholders agree to assign the lease on the Strand for $2500. What difference does it make whether there was an actual assignment or a new lease, is beyond me.

The Court: The question is, the first question on the $2500 comprehended all three. With the proposition the way it is this agreement in evidence states the consideration [fol. 1773] for a single house. It is part of the cross-examination. Proceed.

([illegible]ocument previously marked as Defendants' Exhibit No. 44 for identification is received in evidence.)

The Court: Let me see what it says.

Mr. Rogers: It reads. (Whereupon Mr. Rogers then read Defendants' Exhibit No. 44 for identification to the Court.)

The Court: Between whom, you say between Gutilla and Bellefontaine Amusement Company?

Mr. Rogers: That is his company.

The Court: What is the date of Exhibit No. 43?

Mr. Rogers: This Exhibit No. 43 doesn't seem to have any date, your Honor, but Mr. Mooney has testified that

was a resolution passed in connection with this sale and transfer. The point I make, therefore, is the $2500 gets down to just the sale of equipment in one theatre, because they were released from the obligation under the lease.

Mr. Wright: Released, he just read from the first release. It is leases, plural, apparently referring to more than one lease.

[fol. 1774] Mr. Rogers: That is not the point. Mr. Mooney testified that the document, Exhibit No. 44, embraced the Strand Theatre. The point is all he paid is $2500 for *was* this equipment left in the Strand Theatre at that time and only for that.

Q. Now, with reference to the equipment in the Strand Theatre, when you made your sale in 1931, you say the seats were included in that sale?

A. Yes, sir.

Q. Now, they were the same seats that were in the house when you bought it in 1924, weren't they?

A. I believe they were, only I may be mistaken, but I believe we put in cushion bottoms, but I am not positive about that, cushion seats.

Q. In other words, they were the same seats, but you might have changed the upholstery in some of the bottoms of the seats, is that it?

A. I believe that is correct.

Q. You are not sure of that, either, are you?

A. It is a long time ago.

Q. That is just a guess?

A. No. I had changed seats in other theatres, and I believe that is one we changed.

Q. Do you have any evidence of that change having been [fol. 1775] made in the seats of the Strand Theatre?

A. No, sir, unless the seats are there today.

Q. So that is the best guess you can make on the subject, is it?

A. Yes, sir.

Q. And the equipment in booth you sold, except for the sound you put in, was the same equipment you had in the booth when you acquired it, is that right?

A. With the exception, I believe, we put in a generator they didn't have before, and the machines were overhauled to take care of the wear and tear.

Q. You mean you paid the usual maintenance charges to take care of your equipment while you were operating the theatre, is that right?

A. Besides that we put in a blower fan.

Q. A blower fan where?

A. A blower fan in the Strand Theatre in the lower floor.

Q. That was an exhaust fan?

A. They call it a blower fan, not an exhaust. We bought it new, if I remember right.

Q. Now, in the interval between your acquisition of those seats in the Strand Theatre in 1924 and your sale to the Schine interests in 1931, hadn't you turned the seats in that theatre back to Mr. Gutilla?

A. No, sir.

[fol. 1776] Q. You say you had not turned them over to him?

A. No, sir.

Q. Now, in connection with this litigation between you, you made a certain settlement, didn't you?

A. No, sir.

Q. Never did?

A. No, sir.

Q. Still owned those seats in 1931, you say?

A. Yes, sir.

Q. All of them?

A. In the Strand Theatre?

Q. In the Strand Theatre.

A. Yes, sir.

Mr. Wright: May I see that last exhibit?

Mr. Rogers: Surely. I have them both. You may see them both.

(Documents handed to and inspected by Mr. Wright.)

By Mr. Rogers:

Q. Do you know what equipment was in the Majestic Theatre in 1931, when you turned it—as you say, you turned it over to Schine?

A. I don't recall the Majestic, the Majestic and Opera House had been closed for a period of time and we didn't consider either one of them of much value.

[fol. 1777] Q. Was there any equipment in the Majestic when you turned it over?

A. To my knowledge the booth equipment and seats were there, but I don't know that as a fact.

Q. You don't know it as a fact, do you?

A. No, sir.

Q. What equipment was in the Opera House when you turned it over to Schine?

A. I don't know. We had taken the machines out of one house and were using them for spares in the Strand. What was at the Opera House I don't know for sure. I think the booth was there.

Q. You mean the full booth was there when you made this deal in 1931?

A. Yes, there is a bill of sale, Mr. Rogers.

Q. The bill of sale is there, was it enumerated?

A. The bill of sale enumerated the articles we sold to Schine.

Q. Have you got a copy of any such list?

A. No, I don't.

Q. By whom was it prepared?

A. I don't know just what attorney was there, whether Mr. Maloney was handling it or not. It don't seem to me he was.

Q. Do you think an attorney would prepare a list of [fol. 1778] equipment in the theatre, or you people would prepare the list?

A. To my knowledge we took the bill of sale we received from Mr. Gutilla and added a few articles on we had purchased to that and turned it over.

Q. Turned it over to whom?

A. With the sale to Mr. Schine.

Q. To whom did you turn it over?

A. Mr. May was the one I believe we closed the deal with in Bellefontaine.

Q. Who prepared this list?

The Court: He is referring to the attorney and you are referring to who did the actual, physical work.

Q. Exactly, sir. Who did prepare it, did you personally prepare it?

A. No, sir.

Q. Who did, who went into that theatre and actually prepared a list?

A. I believe it was still the same list we had from Mr. Gutilla from the time Mr. Gutilla turned it over to us.

Q. That is what you believe, but you don't know?

A. No.

Q. Hadn't you moved some of the booth equipment out of the Opera House to the Strand booth?

[fol. 1779] A. I said we had moved one or two machines to the Strand; whether they was still in the Strand Theatre or the Opera House, I don't recollect; I have a faint recollection of some machines, but what happened, whether they were assigned back to me, or given back to me, or something, but I just don't recall what that was.

Q. When you acquired the three theatres, the Majestic, Strand and Opera House in Bellefontaine, you then had a closed town, didn't you?

A. Yes, sir.

Q. And you acquired all three so you would have a closed town, didn't you?

A. That is right.

Q. You gave us some figures on the admission prices that were charged at the time you operated, before Schine came into the town, and the prices that Schine charged when he came into the town?

A. Yes, sir.

Q. Now, when you were testifying as to those admission prices, were you relying entirely on your memory, or had you had recourse to any source to get those figures?

A. Strictly on my memory.

Q. Well, do you recall as a matter of memory what your own prices were at the Strand Theatre before Schine came in?

[fol. 1780] A. Either 30 or 35 cents, I wouldn't be sure which it was. I think it was 35.

Q. You mean you don't recall what you charged in your own theatre as your admission prices?

A. No, sir, it has been a long time.

Q. As a matter of fact, did you ever charge 35 cents before Schine came into the town?

A. I thought we had.

Q. Did you?

A. Yes, we charged 50 cents.

[fol. 1781] Q. I am talking as a steady policy.

A. No, sir, I think we charged 35 cents.

Q. In what year did you charge 35 cents?

A. When sound came in.

Q. In about 1927 or 1928?

A. At the time we installed sound.

Q. When was that?

A. I would say possibly 1928 or 1929.

Q. Then it is your recollection that as a steady policy in 1928 and 1929 and 1930 and 1931 you charged 35 cents in that house?

A. To the best of my recollection. I have operated other houses and I can't just definitely say what I charged in Bellefontaine.

Q. You knew that the question of these box-office admission prices is very important in this case, didn't you?

A. It was either 30 or 35 cents.

Q. Just simply answer my question. You knew that was important in this case, didn't you?

A. I had no way to look up——

Q. No. Answer my question.

A. Yes, it is important.

Q. What did you tell Mr. Wright as to what the box-office admission price was when he interrogated you before you became a witness here?

[fol. 1782] A. I said 30 or 35 cents.

Q. You didn't go beyond that?

A. No, sir.

Q. Made no effort to verify it?

A. I had no way to verify it.

Q. Let me ask you something: In the operation of that Bellefontaine Strand Theatre you advertised in the newspaper during those years, giving the attractions at the Strand Theatre, didn't you?

A. That is right.

Q. You gave them the price of admission too; is that right?

A. That I don't know.

Q. Don't you remember that?

A. It might have been in and it might not. I didn't manage the house. I was not down in Bellefontaine.

Q. In other words, you were not in Bellefontaine at all; were you?

A. Just occasionally.

Q. So that the best your memory serves, this was just an occasional visit you paid to Bellefontaine and you don't know what the general policies were; is that right?

A. At the time I knew definitely what the policy was. I laid the policy down.

Q. During which time?

A. During the seven years we operated the theatres.

[fol. 1783] Q. You laid down the policy but you don't know whether that policy was carried out, do you?

A. Yes, I know it was carried out.

Q. Do you know that the 35-cent policy was ever carried out from 1927 to 1931?

A. I said yesterday that it was 30 or 35.

Q. No, I am talking about 35 cents all the time.

A. I am not positive that it was 35 cents at any time.

Q. That is what I want to get. Let me ask you this: As a matter of fact, in February of 1931, which was the same month when the Holland, the Schine house, opened, isn't it true that your prices of admission at the Strand Theatre matinee was, children, 10 cents, and adults, 25 cents?

A. I believe that is right.

Q. And weren't your evening prices: Children, 10 cents, and adults, 30 cents?

A. I don't know. I thought it was 35. 30 or 35. I would have swore it was——

Q. I am merely asking you the simple question. Isn't that right, as to the evening prices?

A. I don't know.

Q. You don't know?

A. It was either 30 or 35.

Q. Will you kindly answer my question? Is that right or [fol. 1784] is that wrong?

A. It may be right.

Q. That the evening prices were: Children, 10 cents, and adults, 30 cents?

A. I am only trusting to my memory.

The Court: The substance of his answer is that he cannot say.

Q. In other words, you can't say; is that it?

A. Not definitely.

Q. Now, you testified, as I recall—and if I am mistaken please correct me—that when the Holland Theatre opened they opened with a price of 10 cents and 25 cents?

A. No, sir, I didn't make that statement. I said 15 and 25.

Q. You are right. 15 cents and 25 cents. Was that the matinee price or was that the evening price?

A. I believe that was the evening price.

Q. When the Holland House was opened in February, 1931, did you make a practice of going to Bellefontaine?

A. Yes, sir, occasionally.

Q. Where did you get that 15 cents and 25 cents price from?

A. From the manager of the house, our house.

Q. You mean the manager of the house told you that——

A. And I believe I saw it in the box office, if I remember correctly, in the Holland Theatre.

Q. Which is the accurate statement, that you got it from the manager of the house or you went over and saw it [fol. 1785] yourself?

A. Both.

Q. And you say that you saw a price of 25 cents on that box office?

A. I believe so.

Q. And when was that?

A. Some time between February and June.

Q. Let us see: You say that was some time between February and June?

A. Yes, sir.

Q. Now, as I recall your testimony, you said that shortly after——

A. I believe the house opened at that price.

Mr. Rogers: I move to strike the answer out.

The Court: Strike it out.

Q. My recollection is that you testified that right shortly after the Holland opened they opened with a 25-cent price?

A. That is right.

Q. Now, which is right, shortly after they opened or some time between March and June?

A. You misunderstood my answer. I thought you meant when was I there in Bellefontaine between the time it opened. I understood—to the best of my recollection the house opened at 15 cents and 25 cents the opening night.

Q. I want to hold you there for a moment. You say on [fol. 1786] the opening night?

A. Yes.

Q. It was 15 cents and 25 cents; is that right?

A. That is my recollection, yes.

Q. And you were there on the opening night?

A. No, sir.

Q. You weren't there?

A. No, sir.
Q. Where did you get that from?
A. From the manager of the Strand Theatre.
Q. In other words, somebody told you that: is that right?
A. He wrote to me.
Q. But you don't know that of your own knowledge?
A. No, sir.
Q. And you took a say-so?
A. Definitely.
Q. When did you, for the first time, visit Bellefontaine and go to the Holland House to see what the price of admission was?
A. Some time between that period. I wouldn't know what month. I would say possibly March or April.
Q. And that was the first time you went there?
A. Yes, sir.
Q. And you say that you saw a 25-cent evening price?
A. To the best of my knowledge, yes.
[fol. 1787] Q. When you say to the best of your knowledge what do you mean? Did you see it or didn't you see it?
A. I think I did.
Q. But you are not sure?
A. I think I am quite sure.
Q. This 25-cent price you are talking about, was that for seats upstairs or seats downstairs in the evening?
A. If I remember correctly it was for seats downstairs and 15 cents in the balcony.
Q. And you say that was true in the evenings?
A. Yes, sir.
Q. You are sure you are not confusing that with the matinee?
A. I don't believe so.
Q. As a matter of fact, don't you know that the price in the matinees was 15 cents balcony and adults 25 cents and that that didn't go into effect until March, 1931?
A. That was not the opening price?
Q. No, sir. Don't you know the opening price was matinee, children, 10 cents, and adults, 30 cents, and the evening price was, children, 15 cents, and adults, 40 cents?
A. No, sir, I don't recall that.
Q. You wouldn't say that wasn't so, would you?
A. I believe it is not so.
Q. You believe it is not so?
A. Yes, sir.

[fol. 1788] Q. Based on what, on what your manager told you?

A. On the fact that the manager said they opened at a lesser admission than we were getting.

Q. That is what the manager told you?

A. Yes, sir.

Q. And you took his word for it?

A. And I believe I verified it.

Q. Did it ever occur to you if you wanted to be accurate in your testimony that you could look at the newspapers current at that time and see what was advertised in those papers and see what the prices were that were advertised by your house and the Holland price?

A. Yes, sir.

Q. Did that occur to you?

A. No, sir.

Q. Did you try to look at a newspaper with your advertisements in to see what you were charging?

A. No, sir. I have never been in Bellefontaine a day since I left there.

Q. When was that?

A. 1931.

Q. When you were talking to Mr. Wright and his assistants you never went to these newspapers to see whether you were giving them accurate information; is that right?

A. I gave them information to the best of my memory, as [fol. 1789] accurately as possible.

Q. And your memory ran back to 1931; is that right?

A. That is right.

Q. When was it that you lowered your prices of admission in the Strand Theatre in 1931?

A. That I couldn't tell you.

Q. You don't know?

A. No, sir.

Q. Well, what did you lower it from and what did you lower it to the first time you lowered it?

A. I imagine we lowered it to meet the price of the other house.

Q. You give me prices. Don't tell me anything about the other house. I want you to give me prices on your own.

A. I couldn't tell you whether we lowered it 25 or 20 or 15. I couldn't tell you.

Q. You don't remember?

A. No, sir.

Q. As a matter of fact, February 19, 1931, the same month when the Holland was opened, didn't you carry an ad in the Daily Examiner, Bellefontaine, showing that your matinee prices were: Children, 10 cents, adults, 25 cents; evenings, children, 10 cents; adults, 30 cents?

A. Possibly.

Q. Is that right?

[fol. 1790] A. I imagine.

Q. So that you were charging 30 cents top in the evening; is that right?

A. If that statement is correct, which I imagine it is.

Q. And do you recall a few days thereafter advertising in the same paper—of course there was only one paper in the town, I understand, that is the Daily Examiner; that is right, isn't it?

A. Yes, sir.

Q. Children, 10 cents; adults, 25 cents, all day, and a bargain hour of 15 cents to everybody from 5:30 to 6:30?

A. That I don't remember because I believe the house was closed during the supper hour. We used to keep the house closed between matinee and evening, to the best of my recollection.

Q. If that ad appears in the Daily Examiner of that date would you say that the house was not operating during that hour?

A. Was that the supper hour?

Q. I am giving you a date, and you are the man that made the policies of the house.

A. That is right.

Q. And did you inaugurate the policy of the bargain hour of 15 cents for everybody from 5:30 to 6:30?

A. I might have. That I don't remember.

[fol. 1791] Q. As a matter of fact, didn't you lower your prices at the Strand Theatre before any change was made in the schedule of the Holland?

A. I think the Holland opened at a lesser admission than we were getting.

Q. And if you are wrong about that and the ads which I have recited to you are right about that, then what is your answer?

A. I can't dispute the ads, if they are right.

Q. I am asking you if the ads are right who lowered the prices first?

A. If the ads are right and what you say is right, the Strand did.

Q. And you did?

A. That is to be proven.

Q. As branch manager of Warner's, you were generally acquainted with theatre conditions in the State of Ohio, weren't you?

A. Yes, sir.

Q. At that time did the Schine interests—and when I say at that time I mean the time prior to your sale of the Bellefontaine interest to Schine, have any theatres in the State of Ohio?

A. Yes, sir.

Q. Where were they?

[fol. 1792] A. They had one in Sidney. I believe they had one in Canton.

Mr. Wright: If the Court please, if only knowledge is to be given after he became branch manager, I want to point out that he did not become branch manager until after he sold out the theatres in Bellefontaine.

Mr. Rogers: He was a salesman for 19 years before that and then he was branch manager. I think this man knew the State of Ohio.

The Witness: I would like to correct that statement. I was with Warner's 19 years including the time I was branch manager.

Q. You became branch manager when?

A. In October, 1932, I believe.

Q. And prior to that you had been salesman for quite a number of years, hadn't you?

A. That is right.

Q. Now will you answer my question about the theatres he had in the State of Ohio?

A. I knew he had two.

Q. Two where?

A. He had it in Sidney, Canton, and I believe Sandusky at the time.

Q. As a matter of fact, don't you know, Mr. Mooney, that those three houses were sold by Schine to Warner's in [fol. 1793] 1930?

A. Yes, sir. I don't know what year. I knew they had them. What year they were sold I didn't know.

Q. It is a fact they were sold in 1930 and sold to your company, the Warner Company?

A. I had nothing to do with that. I am in the distribution end and that is the theatre branch. They are two different units.

Q. Out of which city were they served?

A. Sidney was served out of Cincinnati and Canton and Sandusky out of Cleveland.

Q. Which exchange were you connected with at that time?

A. Cleveland.

Q. You knew that Cleveland was serving those theatres for Warner, didn't you?

A. I don't remember the date. I knew that Schine sold out to Warner's, which included Alliance and some other towns, but I didn't know the year it was sold out.

Q. You knew it was sold before——

Mr. Wright: If the Court please, before we go into this long bickering over dates as to acquisitions, there ought to be some showing as to how it is material. I can't, for the life of me, see what difference it makes whether Warner's [fol. 1794] sold these theatres out in 1929 or 1930 or 1931, or what possible connection it has to do with the direct examination, or any issue in the case.

Mr. Rogers: I shall now have the pleasure of enlightening Mr. Wright. I hope you will listen carefully, Mr. Wright. You have been making a great point of the tremendous buying-power of Schine and the exertion of that tremendous buying-power against these other exhibitors, that by reason of that buying-power he was forcing them out of business. If Mr. Schine did not have a single theatre in the State of Ohio at the time how in Heaven's name could he force them out by that tremendous buying-power? I hope that enlightens you, Mr. Wright. It shows the competency of it.

Mr. Wright: If the Court please, the evidence as to what theatres Schine had is not in dispute. It is a matter of record. As to examining this witness on it, it is a complete waste of time.

The Court: Is it in the record when Schine sold to Warner's

Mr. Wright: The date of his acquisitions are all in there. [fol. 1795] The Court: The date of his sale to Warner may be important. I will let him answer. Give, as nearly as you can tell, the date.

Mr. Rogers: As a matter of fact, your Honor, that sale is not in the record.

Mr. Wright: There are certainly more witnesses more competent than Mr. Mooney on that point, that can put it in.

The Court: Let us not take up time with unnecessary discussion.

By Mr. Rogers:

Q. With reference to the Strand Theatre in Bellefontaine, during the period when you were operating that theatre you were also in the employ of Warner's, weren't you?

A. Yes, sir.

Q. How much did the Strand Theatre pay, on an average, for pictures played at the Strand Theatre?

A. That I hesitate to say.

Q. You don't know?

A. I don't recall, no. I have bought pictures for hundreds of houses since then.

Q. You weren't buying pictures for hundreds of houses at that time, were you?

A. No, sir.

Q. Were you buying pictures for any other houses——

[fol. 1796] A. Yes, sir.

Q. ——except those seven you were personally interested in at that time?

A. No, sir, definitely not.

Q. How many houses were there?

A. I had one in Bellevue and in Bellefontaine.

Q. There were just two houses; is that right?

A. Right.

Q. While you were buying for just those two houses can't you tell me how much you were paying for features at the Strand Theatre in Bellefontaine?

Mr. Wright: The best evidence of that would be the records of the company. Those are certainly available. If it is going to be material to show what those rentals are I suppose they can be gotten from the records of the distributors in question.

Mr. Rogers: I know of no better source than the man who was in charge of sales for Warner's.

The Court: I suppose there are company records to show what was paid.

Mr. Rogers: He knows what he paid. He sold them to himself and he bought them himself.

The Witness: I beg your pardon. I bought them out of the Cincinnati office.

[fol. 1797] The Court: Would they vary with different pictures?

Mr. Rogers: No, there is an average. Every practical theatre-owner knows what is an average. He knows what the house can bear and what it can't bear.

The Witness: That is a misstatement. Bellefontaine was served out of the Cincinnati office at that time and I bought my product——

Q. Whether it was served out of Cincinnati or whether it was served out of Kalamazoo, all I want to know is: What did you pay on an average for a picture?

A. I can't remember.

Q. Don't remember at all?

A. No, sir.

Q. Whether you paid on flat rentals or whether you paid on percentage?

A. Some of them were flat. The majority flat, and some on percentage.

Q. Those on percentage were a few big features a year; is that right?

A. Yes, sir.

Q. And the rest of the product was paid on a rental basis?

A. Yes, sir.

Q. And you can't tell us what you paid?

A. No, I don't know exactly what we paid.

[fol. 1798] Q. After the Holland was completed in Bellefontaine do you know what the Holland paid for features?

A. Yes, later on after I became manager I have some idea, but I couldn't swear what their deal was.

Q. Don't you know what their deal was?

A. Some was percentage and some flat.

Q. Wasn't their deal primarily a percentage deal at the Holland?

A. As I recall, they had a percentage deal and I believe that there was a clause in there that they had the right to play percentage pictures flat if they saw fit in some of their contracts. Whether that was in the Bellefontaine contract

I don't know. I know definitely it was in the Wooster contract and——

Mr. Wright: The master deals with Warner through 1935-36 or 1938-1939 are all in evidence. They show what the terms were. It seems to me it is a waste of time to examine this witness about them.

Mr. Rogers: 1931-1932 I am asking about.

Mr. Wright: The Holland I think is included in the deals that are in evidence here for the later years.

The Court: 1930-1931?

Mr. Wright: No, not 1930-1931. Is that the year you are [fol. 1799] talking about?

Mr. Rogers: Yes.

A. I was not manager in 1931. I didn't see their deals.

Q. When did you become manager?

A. In 1932.

Q. Did you see their deals in 1932?

A. Yes, sir.

Q. Wasn't there a percentage deal in 1932 on the Holland?

A. Some percentage and some flat.

Q. Are you sure of that?

A. Yes, sir.

[fol. 1800] Q. I thought you first testified that the deal was primarily a percentage deal, but they had the right to play some pictures flat, which was it?

A. Both. They had some percentage and some flat. If I recall correctly they had the privilege of converting some of the percentage to a flat buy.

Q. Do you know how the prices paid in 1931-32 at the Holland compared to the prices you paid at the Strand for features? Warner I am talking about.

Mr. Wright: He has already testified he doesn't know what the Holland paid in 1931-32.

The Court: The question is: Does he know how they compared?

The Witness: No, I don't.

Q. Haven't any idea?

A. No, sir.

Q. You know by comparison that the Holland paid more?

A. Yes, should have.

Q. And considerably more?

A. They should have.

Q. As far as the Holland was concerned, did you ever visit the Holland?

A. No, sir.

Q. Never been inside the house?

A. No.

[fol. 1801] Q. You saw the exterior?

A. Yes, sir.

Q. A fine, modern house?

A. Very nice.

Q. Do you remember how many seats it had?

A. About 1400.

Q. Air conditioned?

A. That I could not tell you.

Q. Modern equipment?

A. Definitely.

Q. The last word in modern construction, wasn't it?

A. I would say so.

Q. You testified that in the season of 1930-31 that you had at the Strand Theatre in Bellefontaine, Fox, First National, Paramount and F.B.O.?

A. Yes, sir.

Q. Now, when you said First National, was that in distinction as between First National and Warner?

A. At that time First National and Warner were two separate organizations.

Q. So you didn't have Warner, is that right?

A. I don't believe so, I don't know whether we did or not.

Q. And you said you didn't have Metro?

A. For the season starting September 30th, we did not have Metro.

[fol. 1802] Q. That is the 1930-31 season, is that right?

A. That is right.

Q. Well, it wasn't because Metro wouldn't serve you, was it?

The Court: What was the question?

Q. It wasn't because Metro wouldn't serve you, was it?

A. Yes, sir, it was.

Q. You say they didn't even solicit you?

A. That is right.

Q. Well, now, let us see. As a matter of fact in the month of October, 1930, didn't you and Metro discuss a deal for 50 pictures at $30 flat, and didn't you sign an application?

A. No, sir, the year 1930, no, sir.
Q. You say that isn't so?
A. Not to my knowledge
Q. Don't you remember Brower, the salesman of Metro, coming in to you in October and discussing with you the 1930-31 product?
A. You see, the Holland opened in 1931; I would like to refresh my memory; from the year the Holland opened in September, from the year the Holland opened, they never solicited me.
Q. You mean from September, 1930 you were not solicited?
A. Definitely not.
[fol. 1803] Q. You say you didn't sign an application for 50 pictures at an average price of $30?
A. No, sir.

The Court: You mean during that period?
Mr. Rogers: No, sir, I mean in the month of October, 1930 for the year 1930-31.
The Witness: No, sir, we never got the pictures.

Q. I am asking you, did you sign an application?
A. No, sir.
Q. Do you remember Brower coming to see you about it?
A. No, sir.
Q. Do you remember Brower soliciting you for the year 1930-31?
A. Brower solicited me for different years, but not the year 1930-31.
Q. Your testimony is you definitely were not solicited?
A. That is right.
Q. And you definitely did not sign an application?
A. That is right.
Q. Now, did you play the Loew's product in the season 1929-30?
A. Yes, sir.
Q. You are sure of that, aren't you?
A. I believe we did.
Q. You are sure of that, aren't you?
[fol. 1804] A. Pretty sure, yes, sir.
Q. As a matter of fact, isn't it true you didn't buy any Metro for the year 1929-30 and didn't play any Metro in 1929-30?

A. No, I don't think that is correct. I believe we run them every year I was there.

Q. Isn't it true the only deal you made in 192--30 for Metro product were nine color-tone shorts?

A. No. I don't believe that is correct, I — believe they would sell me nine shorts without anything else.

Q. You say that isn't correct?

A. I don't think it is.

Q. You say you didn't sign a contract for those nine, and didn't play them and didn't pay for them, is that right?

A. No, sir.

Q. You say that isn't so?

A. Not to my knowledge it isn't.

Q. Now, did you have Paramount in 1929-30?

A. There was one year we didn't have Paramount; what year that was, I don't know.

Q. Wasn't that the year 1929-30?

A. That I couldn't tell you.

Q. You don't remember, do you?

A. No, sir.

Q. Now, with reference to the Medina situation—now, [fol. 1805] this talk that you say took place between Mr. Essick and yourself and Mr. Kalmenson at the Cleveland office, now, as I understand it that talk that you claim was had at that time that Mr. Essick said "I intend to build a theatre. If I build a theatre, can I have the product," and Kalmenson says "It is yours definitely," is that right?

A. Correct.

Q. That was the substance of the conversation?

A. Definitely.

Q. Now, did Essick show Mr. Kalmenson any plan of the proposed theatre?

A. No, sir.

Q. How many seats the house was going to have?

A. No, sir.

Q. Or what kind of a house it was going to be?

A. No, sir.

Q. Was there anything mentioned about price?

A. No, sir.

Q. Nor whether the pictures were to be on a flat rental or percentage basis?

A. No, sir.

Q. Or what the clearance of the house was to be?

A. No, sir.

Q. In other words, no terms, no conditions were men-
[fol. 1806] tioned was that right?

A. Yes, sir.

Q. And without the mentioning of any price, terms, conditions, or knowing anything about the kind of house that was going to be built, Kalmenson said "The product is yours; is that right?

A. Definitely.

Q. Did he tell him what period the product was his?

A. He didn't say for any period.

Q. Forever and a day, or one year?

A. It wasn't discussed.

Q. No season discussed?

A. No.

Q. And you didn't know when the house was going to be completed?

A. No, sir.

Q. Now, in Bellefontaine you were playing four major products, weren't you?

A. I believe so.

Q. They were four good, major companies, weren't they, and you were losing money, is that right?

A. During the period; I wasn't losing money until after the new house opened.

Q. Prior to that you were making plenty of money?

A. Made money.

[fol. 1807] Q. A lot of money?

A. I made money.

Q. You just made money, you just barely got by?

A. I didn't say that.

Q. When you say you made money——

A. Made good money.

Q. And when you say "Good money," about how much money did you make?

A. I am not free to say.

Q. You don't know, do you?

A. I have a fair idea.

Q. What is your fair idea about what you made, by way of clear profit?

Mr. Wright: I don't see how it is material what the precise amount he made there was. He has testified it was profitable before the new theatre opened, and then he list money. What difference does it make how much it was?

The Court: The comparison before and after is the point, whether he dropped from $10,000 to $2,000, approximately.

The Witness: Are you speaking about a year?

Mr. Rogers: The year.

The Court: Which year?

[fol. 1808] Mr. Rogers: The prior year.

The Court: The prior year, '29 and '30?

The Witness: Oh, I would say possibly $10,000.

Q. You made clear profit?

A. Something like that.

Q. And paid income tax on it?

A. Yes, sir.

Q. Now, in 1931, with these four products, you say that up to the day that the doors of the Holland House were opened, you were making money?

A. That is right.

Q. The day they opened their doors you started losing money?

A. Yes, sir.

Q. How much were you losing?

A. I believe in the period of time we lost close to $8,000.

Q. In the period of which time?

A. From February until we sold the house, somewhere around in there.

Q. In other words, January was a very profitable month?

A. I don't know how profitable it was that year.

Q. Well, were you making about the same average profit in January as you made the year before in January?

A. No, I don't believe in January we made as much as we made the previous years. I believe business was on the [fol. 1809] decline at that time.

Q. As a matter of fact, business was on the decline beginning in the middle of 1930, wasn't it?

A. Possibly was.

Q. And it kept on getting worse and worse?

A. We still made——

Q. I am asking you, didn't business keep on getting worse and worse from the middle of 1930 to the end of 1930?

A. That I wouldn't say.

Q. Wasn't business very bad in Bellefontaine in 1931?

A. Very bad.

Q. In that particular year and territory?

A. In Bellefontaine.

Q. It was a depression year and people weren't going to the theatre?

A. They weren't going to ours.

Q. They had no money to go to the theatre, did they?

Mr. Wright: If the Court please, that is pure speculation at this point.

The Court: Yes.

Q. As I recall, you testified that when Schine got his first-run situation established that you don't recall of any situation where competitors got repeat or subsequent-run, or second-run, is that right?

A. Let me understand that, give me it again, please.

[fol. 1810] (Question read.)

Mr. Wright: He didn't testify that way at all.

Mr. Rogers: It is my understanding.

Mr. Wright: You are mistaken.

Mr. Rogers: I think that was pressed by Mr. Wright this morning. Mr. Wright indicated that as far as others were concerned, second-runs, or repeats could be had and that prevailed particularly in 1936-37, as I recall.

The Court: Repeats could be had by Schine in six days.

Mr. Rogers: Yes, but he said when Schine established his first-run purchasing in a town competitors could not get any subsequent-run or second-run against him.

The Court: There was some question in that regard. Ask him. Was that your testimony?

The Witness: No, sir.

By Mr. Rogers:

Q. Is it your testimony that so far as Schine is concerned competitors were sold second-run and subsequent-run to be played after the Schine Theatre played their first-run?

A. At one time we were not allowed to sell in opposition to a Schine house, but later on we were selling in opposition to Schine; not in opposition, but a second-run in a Schine [fol. 1811] situation.

Mr. Rogers: I move that it be stricken out. I am asking for a fact.

The Court: Strike it out.

Mr. Wright: He asked for it.

By Mr. Rogers:

Q. I am asking you as a fact, didn't you sell——

A. In what year?

The Court: Listen to the question. Go ahead.

Q. Didn't you sell opposition houses to Schine second or subsequent-runs where Schine had the first-run?

A. During what year?

Q. Let us take 1936-37.

A. I believe I am correct in 1936 and '37 was the first year we did sell a second-run in any Schine town.

Q. I am asking you, you did, didn't you?

A. One year we did, beginning in one, what year we started, I don't know. I believe it was the 1936-37 product.

Q. And thereafter you also did didn't you?

A. That is right.

The Court: We will suspend for five minutes.

(Short recess.)

Mr. Rogers: I believe that concludes my cross-examination for the present, sir.

Mr. Wright: What do you mean by "for the present"?

[fol. 1812] Mr. Rogers: Well, you may have some questions to ask.

The Court: That concludes the cross-examination.

Redirect examination.

By Mr. Wright:

Q. Mr. Mooney, calling your attention to this Defendants' Exhibit No. 44, I note that that refers to leases, what do you know, what other lease besides the Strand Theatre lease that included?

A. I believe it included the Opera House and the Majestic leases.

The Court: Was there more than one bill of sale?

The Witness: One bill of sale, the Majestic and Opera House had been closed for a period of years and we didn't consider them of any value. The Strand was the only asset we had to sell.

By Mr. Wright:

Q. Did you receive anything more than the $2500 that is mentioned in this Defendants' Exhibit 43?

A. No, sir.

Q. That is, you didn't. Was this cancellation of leases that is marked Defendants' Exhibit 44 executed as part of the deal you made with Schine when you got the $2500?

A. I believe it was, yes, sir.

Q. That is, you didn't get anything from Gutilla for this?

[fol. 813] A. No, sir.

Q. And was there any theatre interest that you had in Bellefontaine at the time that wasn't included in the deal you made with Schine for $2500?

A. No, sir.

Mr. Wright: That is all.

The Court: Next witness.

Mr. Rogers: That is all.

Mr. Wright: Mr. Essick.

Perce E. Essick a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Essick?

A. Cleveland, Ohio.

Q. What is your occupation?

A. Theatre owner.

Q. You are interested in a theatre in Medina, Ohio?

A. That is right.

Q. Or theatres, and you hold a position in the Medina-Princess Corporation?

[fol. 1814] A. I do.

Q. What is your title there?

A. Secretary.

Q. Do you know who the President is?

A. The President is Mr. Myer Schine.

Q. And when did you enter the theatre business in Medina?

A. The question again, please?

The Court: When did you enter the theatre business in Medina?

The Witness: Well, we opened up on January 1st, 1938, that is, the theatre opened.

By Mr. Wright:

Q. When you say "we," whom do you refer to?

A. Refer to my associates of the Medina Temple Theatre Company.

Q. Who were they?

A. Myself and Mr. Fine and other associates.

Q. The Medina Temple Theatre Company is a company which owns a half interest in the Medina-Princess Corporation?

A. That is correct.

Q. Have you the agreement? You were asked to bring your copy of the agreement, Mr. Essick, but, as I understand, you didn't bring it with you?

A. That is right.

[fol. 1815] The Court: Who owned the other half interest at that time?

Mr. Wright: You mean when they first built the Medina? They now own a half interest in the Medina-Princess Corporation. This agreement I am about to offer and set forth shows, I think, the nature and extent of the interest. I will ask to have this marked with the next Plaintiff's exhibit number for identification.

(The agreement, Medina-Temple Theatre Company and Medina Masonic-Temple Company, was marked as Plaintiff's Exhibit 648 for identification.)

Q. I will show you this copy of an agreement, Mr. Essick, marked 648 for identification, and ask you if you recognize that as the copy of the agreement made between your Medina-Temple Corporation—and what is the other party there?

A. The Medina-Temple Company and the Medina—the Medina-Temple Theatre Company and the Medina-Masonic Temple Company. One is a building company and the other is a theatre company.

Q. Is this the agreement under which the Princess and Medina theatres are now being operated there?

A. That looks like it. That is the Medina Theatre Com-
[fol. 1816] pany and the Princess Theatre Company. I didn't read through it to verify it, but I presume that is it.

Q. When did you first make an investigation of the theatre possbilities in Medina?

A. Well, I didn't make a survey immediately in Medina. I was approached by the Masonic organization, a committee for the Masonic organization down there, and they came into my office.

Q. When was that?

A. That was in the early part—I imagine around September of 1936. And I asked them how they had come to get ahold of me and they said that they had heard of me through——

Mr. McClennen: I take it that this conversation——

The Court: It is not responsive. You asked him when and he said in September.

Mr. Wright: I do not think the conversation is of any significance.

Q. At the time you were approached by Medina there in September, and the people from the Temple company?

A. Around September; that is right.

Q. And after they came to see you did you look into the theatre situation there?

A. I went down to look over the situation.

Q. And what did you observe?

[fol. 1817] A. Well, I observed—I had to look over the property that they referred to and also the theatre that was in the city.

Q. The property, was it a vacant lot or was it a building?

A. No, it was a Masonic building.

Q. And the theatre that was there was what?

A. The Princess Theatre was there.

Q. Did you note what the Princess Theatre was playing, what product it was using?

A. No, not at that time I didn't.

Q. Then after you saw this building what, if any, plans did you make toward putting up a theatre there?

A. We first had a number of discussions with the committee relative to what they could do and what could be done with the building, and things of that type.

Q. Then did you finally reach a decision to go ahead there?

A. We finally reached a decision to go through after various meetings.

Q. And at that time did you make any investigation of the product situation, the film product situation, in Medina?

A. I did.

Q. And what did you find?

A. I found Warner's and First National and Columbia and Universal and United Artists were not being played in the town.

[fol. 1818] Q. Then did you have any conversation with the Warner people about using their pictures in Medina?

A. I had talked to Mr. Mooney a number of times. It was common knowledge that we were talking about Medina. So that I told him that if we closed the deal that I would let him know.

Q. Do you recall any specific conversation with Mr. Mooney in his office when Mr. Kalmenson was present?

A. Well, I was booking in there one day, I imagine around the latter part of December or some time in December——

Q. The latter part of December or what?

A. The latter part of December of 1936, some time around in December. It was either the latter part of December—— I think it was around December, some time in December, and I was booking for the other theatres.

Q. For other theatres you were interested in?

A. That is right. And I told his secretary that I wanted to see Mr. Mooney and he stepped out and I said hello to him. I said, "We are just about at the finish of a deal, in fact I think we will close in the next few days." He said——

Mr. McClennen: If your Honor please, we note the objection to this conversation for all the reasons that have been stated heretofore to your Honor.

[fol. 1819] The Court: Overruled. Go on.

A. He said, "Come on in." He said, "I want you to meet somebody." And I went in and he introduced me to Mr. Kalmenson, whom I had never met before. So I met Mr. Kalmenson and Milt was very, very much elated. He said, "We are tickled to death. We have been out of there for several years," and Mr. Kalmenson says, "What is this?" So Milton explained the thing to him, that the town of Medina was 35 miles from Cleveland; that they had been out of there for quite a number of years and that we were going to build there. He said, "If Milt says so, it is O.K." He said, "The pictures will be yours. Don't worry."

And at that time I discussed—we were building another theatre in Akron, Ohio, at the same time, and I said under the circumstances we were able to hook up the two thea-

tres building, and so forth. He said, "Don't worry, the pictures are yours, and we haven't been there for years. You can rest assured of that."

Q. Then did you go ahead with the theatre building at Medina?

A. We went ahead with the theatre building.

Q. When did you start the construction?

A. We started construction either the last of February or the first of March.

[fol. 1820] Q. And then when did you finally get it open?

A. We didn't open up until January of 1938.

Q. What was the reason for the delay?

Mr. McClennen: That is objected to.

Mr. Wright: If he knows.

The Court: I will let him state. What was the reason for the delay?

The Witness: We got into that steel strike.

Q. What kind of a theatre did you finally have there, how large was it?

A. I think it seats around 900, maybe a little under or a little over. It is modern.

Q. How did it compare, generally, with the Princess Theatre there?

A. There would't be any comparison. We had a modern, up-to-date theatre.

The Court: What was the comparison with respect to size?

The Witness: In respect to the other theatre there wouldn't be any comparison at all because we had a modern, up-to-date theatre.

By Mr. Wright:

Q. Do you know how old the Princess was?

A. No. I imagine it was quite old. I don't know the exact——

Q. Did you have any further conversation with Mr. Mooney about pictures for Medina in the fall of 1937?

[fol. 1821] A. Well, I had quite a few conversations at different times when I would meet Mooney during the course of the entire year. He would ask me how we were coming along, and according to his word that everything was all

right, when we got ready the pictures were ours, so that I happened to go into his office——

Mr. McClennen: We have our objection to that that it is not within the question, and also the general objection.

The Court: He asked you if you had a talk with him before the opening of——

Mr. Wright: I take it what he is leading up to is the conversation I asked him about. In the fall of 1937 he said this was. I asked him if he talked to him in the fall of 1937.

The Court: Did you have a talk with him in the fall of 1937?

The Witness: I did.

The Court: All right.

By Mr. Wright:

Q. Where was that talk?

A. In Mr. Mooney's office.

Q. At Cleveland?

A. That is right.

Q. Who else was present there then?

A. I don't think anybody was present at that time except [fol. 1922] myself and Mr. Mooney and perhaps the salesman. I don't even know who the salesman was.

Q. What was said then?

Mr. McClennen: The same objection.

The Court: Yes.

A. We had started to work on the deals for all the theatres, and I imagine this was around the first part of November, I would say between the 1st and the 15th of November, and we had gotten through all the other theatres, and after we had practically completed all those I says, "Well, now, Milt, what about the Medina?" He says, "Perce, I am very sorry to tell you that Mr. Kalmenson has gone to Gloversville and sold Schine a deal in Medina for all the product." I says, "Well, Milt, I can't believe that." He says, "Well, it is a fact, Perce." I says, "What do you expect us to do down there?" I said, "We had your definite promise and also backed up by Mr. Kalmenson, it was only a question of, when we got ready, to sit down and make the deal, that is all there would be to it." He says, "I know that, Perce, but I have nothing to say. I can't

go forward with the deal in Medina." I says, "If that is the case are the rest of the deals set?" He says, "My advice to you is to get in touch with New York because I can't do you any good."

[fol. 1823] Q. Then what did you do?

A. Well, I called Mr. Fine as soon as I found out the situation. I said, "Myer"——

Mr. McClennen: This is objected to.

The Court: Yes.

Q. Don't give us any conversation you had with Mr. Fine. Just tell us what you did after you called him.

A. We made arrangements to go to New York.

The Court: Fine was your partner?

The Witness: That is right. We went into the Warner office.

By Mr. Wright:

Q. Who did you see there?

A. I saw Mr. Kalmenson and Mr. Lesserman and Mr. Oakes was there at that time and Roy Haynes.

Q. What was the conversation then?

A. The conversation was quite heated and we went to bat with Mr.——

The Court: Just tell what was said.

Q. Give us the substance of it, as nearly as you can recall.

A. We went to Mr. Lesserman immediately and he called Mr. Kalmenson and Haynes and Mr. Oakes was just in there from the Coast, and we told Mr. Kalmenson that we understood that he had sold the pictures to Schines and he had made a prior arrangement with us and had given his word of honor, and I had also received word from Mr. Mooney [fol. 1824] that the product was our pictures, and he denied emphatically, up and down, that he hadn't done anything of the kind.

The Court: Anything of what kind? That he hadn't had a talk?

The Witness: That is right. He denied the conversation entirely, that he had never said anything about it to us, and I recalled the instance of when I met him in the office and the fact that they were elated that they were going to

get into a theatre that they hadn't been in for a number of years. We weren't making much headway with him.

By Mr. Wright:

Q. When you said "get into a theatre"——

A. It was the Medina Theatre in the town of Medina.

Q. Medina was the name of your new theatre?

A. Yes.

Q. Did you say your theatre was called the Medina?

A. Yes, that is right, the Medina Theatre.

Q. Go ahead.

A. And so Mr. Lesserman, who was the Eastern Sales Manager there at that time, he got into the picture, and we told him it was one thing or the other, we were either going to get Warner Bros. product or we were going to go to the Department of Justice. So that the length of *of* the [fol. 1825] conversation was that Mr. Lesserman promised to go to Gloversville some time in the near future, within a couple of weeks, and he told us emphatically that he wouldn't be able to get all the product but he would at least try to get us half. But he didn't even promise that to us, but he said he would see what he could do. And I said, "We are going to open that theatre down there; we haven't any product; we are going to open that theatre and your product was promised to us."

So that that was the condition that we left New York under, as far as the Warners are concerned.

Q. Did he say who he was going to see in Gloversville?

A. Well, I imagine—I wouldn't know. I think he said he was going to see Mr. Schine or Mr. Lynch. I forget who he said he was going to see.

Q. Then did you hear from him again?

A. I heard from him again; that is right.

Q. When?

A. I think I heard from him after we were opened the first part of January.

Mr. Wright: I will ask to have this contract between the Medina-Temple Theatre Company and Vitagraph, which is in this folder 635-C for identification, marked as Exhibit 635-C-1.

[fol. 1826] (The contract between the Medina-Temple Theatre Company and Vitagraph referred to was marked as Plaintiff's Exhibit 635-C-1 for identification.)

Q. I call your attention to this contract that is marked here Exhibit 635-C-1 for identification and ask you to note the date on that.

A. January 28, 1938.

Q. Do you recognize that as the contract you made with Vitagraph for the 1937-1938 product, for half of it?

A. That is right.

Mr. Wright: I will offer this contract in evidence.

(The contract previously marked as Plaintiff's Exhibit 635-C-1 for identification was received in evidence.)

Q. I call your attention to the fact that there are several gaps opposite the numbers which describe the feature pictures that were sold to you, where there were no terms stated on the half called First National Productions.

A. I see that.

Q. Do you know what happened to those pictures?

A. I presume they were played in the other theatre prior to our opening.

Q. Do you know that?

[fol. 1827] A. I remember seeing some of the Warner's and First National pictures being played down there prior to our opening, but I wouldn't be able to tell definitely that those were the ones, but I imagine they were.

Q. It appears from the contract, does it not, that you got half the production, less those in the Warner half which had already been played?

A. I think they told us they were already played and I think I saw one or two of those down there. That is, I saw them when I passed by the theatre when I happened to be in the town.

Q. What, if any, efforts did you make to get all of the Warner features for the next season, 1938-1939?

A. Mr. Oakes came to Cleveland. He had been in New York at our last conference. And he said, "Perce, believe me, you are lucky you got half of it, and that is all I am in position to offer you today. Either you can take it or leave it." So that we took it.

Q. Now, you are referring to a conversation that occurred just before this contract was signed?

A. No, the next season. You asked me about the next season.

Q. 1938-1939?

A. That is right.

Q. When was that conversation, approximately?

A. That was in the fall of the next year. That was in [fol. 1828] 1938 for the season 1938-1939.

Q. When you opened the season in January, what product did you open it with?

A. We had Columbia and half of Warner's, which we didn't get until later on, and I don't think I had Universal at that time. I am just thinking from memory. We were very short of product.

Q. Do you recall what product was played at the Princess?

A. The Princess was playing Metro, Paramount, Fox, RKO and Republic.

Q. Plus the half of Warner?

A. Plus the half of Warner.

Q. Or half of Vitagraph, rather?

A. That is right.

Q. How about United Artists?

A. United Artists, I think we had a split of United Artists at that time when we opened up. I think we had a split of United Artists.

Q. By that you mean you had half and the Princess had half?

A. Yes, but there were so few pictures it didn't mean anything.

Q. As I understand the testimony, what you had to play there some time after you opened was half of Vitagraph, and Columbia and Universal and half of United Artists; is that right?

[fol. 1829] A. That is correct.

Q. Were you able to operate profitably with that product?

Mr. McClennen: That is objected to.

The Court: I will let him state whether he did operate the theatre profitably. You mean after——

Mr. Wright: When it opened.

The Court: After he opened it? I will let him state that.

A. Our first two or three months, being a new theatre, we did, I would say, fair.

Q. You made some money during the first two or three months?

A. No, we just broke about even.

Q. You broke about even for the first two or three months?

A. That is right.

Q. Then what happened with reference to making or losing money?

Mr. McClennen: We urge that this has no bearing on the issues.

The Court: I will receive it. Unless it is connected up it is not very important.

A. We lost money from then on.

Q. Then in the summer of 1938 what, if any, efforts did you make to get additional product from the theatre, additional major product?

A. We made other efforts prior to that before we had opened up the theatre. While we were in New York I [fol. 1830] discussed with—is this outside of the question or not?

Q. I was calling your attention particularly to what you did in the summer of 1938, that is after you had been operating for several months.

A. Well, I went into Metro——

Q. Do you remember who you saw there?

A. I saw Mr. Rodgers.

Q. Did you talk to him about it?

A. We talked with him, but he had nothing to do with it, but he referred us to Mr. Tom Connors.

Q. When you say "us" who are you referring to?

A. Mr. Fine and myself.

Q. Your conversation was with Mr. Connors?

A. That is right.

Q. What was his position, in your talk?

A. His position was that they had always done business with the smaller theatre and they felt they should stick by their prior customers and he didn't see why he should sell us. And I said, "Well, now, after all, Mr. Schine has just came into this picture after we were in the town and you saw fit to do business with him. Why not with us?" And he said, "We still look at the other people as our customer and not Mr. Schine." So that I didn't get very far.

Q. There were no negotiations other than what you mentioned?

[fol. 1831] A. That is as far as I could get with him.

Q. Then did you see Mr. Connors again in the fall of 1938?

A. Yes, when we were buying for the other theatres the Medina situation kept coming up all the time and Mr. Connors said we were foolish down there, that we should try to get together and make some arrangement that would be satisfactory to everybody.

Q. Who should get together with who?

A. That we should get together with Mr. Schine and he should get together with us.

Q. What did you say?

A. I said, "We haven't been able to do anything." He wanted to know if he could make arrangements—we could use his offices to talk over a deal where we would both go in together, as this was a situation he would like to see cured, it was not healthy for anybody concerned.

[fol. 1832] Q. Well, that is, who go in together, when you say "we", who are you referring to?

A. Schine and Schine Enterprises and ourselves go in together and pool the town.

Q. I will show you this letter addressed to yourself and Mr. Fine, dated December 7th, 1938, and ask you if you recognize that as a copy of a letter that you received?

A. That is right.

Mr. Wright: We will offer this Exhibit No. 511 in evidence.

The Court: Is it marked?

Mr. Wright: It has been marked as Exhibit No. 511 for identification.

Mr. McClennen: We urge the general objection to these communications, not with us.

The Court: Purported to be from one of the alleged co-conspirators.

Mr. McClennen: This appears to be a letter—this is a letter from Mr. Connors, of Metro, to Mrs. Perce Essick and Mr. Myer Fine. This copy has no signature. We are objecting on the general ground that such communications are not admissible against us.

The Court: Well, it has no signature?

Mr. Wright: This is an unsigned copy because it is a [fol. 1833] copy that came from Loew's files. This is one of the documents that was identified.

The Court: I suppose you should first show that the original was destroyed.

Mr. Wright: I did not understand there was any objection on that ground.

The Court: Maybe not. If the objection is simply based on the general objection heretofore made.

Mr. Wright: That was my understanding, that there was no objection on the ground that the original hadn't been produced.

Mr. McClennen: The original has not been asked for, as far as I know, of Mrs. Essick or Mr. Fine.

By Mr. Wright:

Q. I believe, were you asked to produce—you were served with a subpoena, were you not, Mr. Essick, which asked you to produce your correspondence with Metro?

A. That is right, but I——

Q. Did you look for the original of this letter?

A. I explained it to the girl that we had in the office. Her husband went to war, and when he went she went with him, and we never could locate any correspondence like that.

Q. You could not find that correspondence?

[fol. 1834] A. We could not.

Mr. Wright: We offer it.

The Court: What search did you make for it?

The Witness: We had a girl in the office. Her husband was at one of our theatres. He was called into the army. She was very much upset because I did not go to the Board to intervene for him, and he was healthy, and I had two boys myself. I figured I shouldn't go to bat for him when I wouldn't go to bat for my own son. He was called, and she was very much upset about it.

Mr. McClennen: May this all be stricken out?

The Court: Strike it out.

The Witness: I am describing how the files were mislaid. I have never been able to locate them.

The Court: Did you look diligently for your files?

The Witness: I have looked diligently and have never been able to find them, and we think that is the cause.

The Court: Objection overruled.

Mr. Wright: This letter is dated December 7th, 1938. I take it this Mrs. Perce Essick and Mr. Myer Fine, do you think that "Mrs." was a typographical error?

[fol. 1835] Mr. McClennen: Just a moment, he didn't write the letter. All I asked you to do is to come right out and call attention to the fact that it was addressed to Mrs. Perce Essick.

The Court: Did you receive the original of which this was a copy?

Mr. Wright: He already testified he did, I believe.

The Witness: I received that letter.

The Court: Is there a Mrs. Essick, is there?

The Witness: There is a Mrs. Essick.

The Court: Connected with the business in any way?

The Witness: No.

The Court. Mr. Fine, your partner's name is Finc?

The Witness: Yes, that is right.

The Court: And address?

The Witness: Film Building.

The Court: Has your wife an interest in the business?

The Witness: No, she has not.

Mr. Wright: The letter reads "Mrs. Perce Essick and Mr. Myer Fine:

Dear Friends: Saw Myer Schine when in Buffalo on Monday. He informed me that he was having considerable trouble in the Medina situation, that it was necessary to [fol. 1836] arrange to buy out one of the partners. Details of the purchase have been about concluded and he is now in a position to go forward, and suggest that another meeting be arranged in New York for confirmation of final details. Would appreciate your advising me when it will be convenient for you to come to New York, so that I can confirm the appointment with Myer. Hope this will find your family well and happy. Kindest personal regards. Sincerely."

Q. Who was it signed the letter, the original you got?

A. Must have been from Tom Connors.

(Thereupon letter previously referred to and marked as Plaintiff's Exhibit No. 511 for identification was received in evidence.)

Q. Then was an appointment finally made for you by Mr. Connors, an appointment with Mr. Schine?

A. That is right.

Q. And do you recall when that was?

A. Well, I feel positive we saw Mr. Schine and his brother the night—the morning following the night they had their dinner in Albany. When that was, what date that was, I attribute the meeting at that time, because we took the trip there for that purpose.

[fol. 1837] Q. Well, look at these exhibits 512, 513 and 514 for identification and see if they won't enable you to fix the date a little more accurately.

A. Well, this must be, that must be the time, around December there.

Q. And in the month of December there?

A. That is right.

The Court: Your answer is 1938?

The Witness: Yes, sir.

Q. And I show you this exhibit 515 for identification, which is the letter dated December 22nd, 1938, addressed to Mr. Tom Connors, which came from the Loew's files, and ask you if you recognize that as a letter that you signed and sent?

A. I wrote this letter.

Mr. Wright: I will offer this Exhibit 515 for identification in evidence.

(Thereupon letter previously marked as Plaintiff's Exhibit No. 515 for identification, was received in evidence.)

Mr. McClennen: To this we make the general objection as to such communications. It is obviously a friendly letter from Mr. Essick to Mr. Connors, not related in any respect to the business of Metro.

[fol. 1838] The Court: Let me see it.

(Document inspected by the Court.)

The Court: Proceed.

Mr. McClennen: In this connection I perhaps should have called to your Honor's attention one thing that has not been mentioned, and that is that there is no allegation, as I recall it, in these voluminous papers, of a conspiracy between the Schine defendants and Mr. Essick and Mr. Fine, and this is not a letter from any even alleged co-conspirator. It is a letter from Mr. Essick, who is not alleged to be a conspirator.

The Court: Well, of course, it does relate to acts of an alleged co-conspirator.

Mr. McClennen: But it is not from a co-conspirator.

The Court: I know. It is part of a transaction with a produeing company.

Mr. McClennen: I simply want to make clear our position in persisting in our objection.

The Court: I didn't see that the letter was very harmful to you.

Mr. McClennen: I quite agree, your Honor.

By. Mr. Wright:

Q. Calling your attention, Mr. Essick, to the phrase in [fol. 1839] the second paragraph "The deal was far from being satisfactory. We closed for $1500 instead of the $2,000 we asked. In doing this we acted solely on your advice and Joe Vogel's." What do the two $1,500 and $2,000 figures there refer to?

Mr. McClennen: This is subject to the same objection.

The Court: Very well.

The Witness: I think it refers to—you have on record the deal that was transacted. I think it speaks for itself what the $1500 was.

Mr. Wright: Well, have you got that?

(Document handed to Mr. Wright.)

By Mr. Wright:

Q. Does that refer to the provisions of paragraph 10 of the agreement which you have in your hand there?

A. No, it doesn't refer to that at all.

Q. Can you tell us what it does refer to?

Mr. McClennen: To that we object, too.

The Court: What refers to what? You mean the document you are showing him now or the exhibit before?

Mr. Wright: I am asking him what these figures $1500 and $2,000 that appear in Exhibit 315 refer to; what those figures are?

The Witness: The $1500 referred to, if I am correct, the [fol. 1840] $1500 refers to that the Schines were to receive $40 per week as a booking fee. After all this was included in the expense of the theatre, and after all expenses were paid, the first $3,000 was supposed to be split 50-50 between their corporation and our corporation. The next $1500 was

to be given to us in view of the fact of our tremendous investment.

Q. What was the amount of your investment in the theatre, the Medina Theatre?

The Court: Was this incorporated in the agreement, written agreement?

The Witness: You mean $1500?

The Court: What you just said about the provision of splitting the first $3,000 and $1500.

The Witness: That is right, it is in the agreement here.

The Court: This paper does refer to the $1500.

The Witness: It does.

Mr. Wright: The question I asked was referring to a specific paragraph. This is another part of the agreement.

Q. Now, will you answer the question? Would you read the question?

Mr. McClennen: I have objected to the question.

[fol. 1841] Mr. Wright: I suggest that it be read.

The Court. All right.

(Preceding question read as follows:

"Q. What was the amount of your investment in the theatre, the Medina Theatre?")

The Court: Objection overruled.

The Witness: Between fifty and fifty-five thousand dollars, the books will show whatever it is. I think that is it.

By Mr. Wright:

Q. That was the total investment of yourself and your associates who built the building?

A. That is right.

Q. Now, I notice this letter, Exhibit No. 515, is dated December 22nd, 1938, and the agreement you have in your hand which is Exhibit 648 for identification is dated February 28th, 1939. Is the latter date the date on which the deal was finally closed?

A. I presume that was it.

Mr. Wright: I will offer this Exhibit 648 in evidence.

Mr. McKay: Your Honor, so that the record is clear, I want to point out that in this copy for some reason or

another there is no copy of Exhibit A, which is a copy of the [fols. 1842-1844] Princess Theatre. There is a copy of Exhibit B, which is of the other theatre.

The Court: It provides for a consolidation of the leases.

Mr. McKay: It puts the two leases in one corporation.

(Thereupon the document previously marked as Plaintiff's Exhibit No. 648 for identification was received in evidence.)

The Court: I think we will have to suspend at this time.

(Whereupon a recess was taken until Wednesday, October 4th, 1944, at 10 o'clock A. M.)

[fol.1845] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al, Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 4th, 1944, at 10 o'clock a.m.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homan, Esq., and Howard M. Antevil, Esq., appearing for Defendants.

(Reporter's Note: Corrections: Page 1841, line 25, add at end of line "lease of the."

Page 1842, line 2, add word so that it reads "which is the lease of the other theatre.)

PERCE E. ESSICK resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Mr. Wright: I note that yesterday at page 1746 of the transcript I referred to the defendants' answer to interrogatory 17-A as showing that a 25 per cent interest in the Princess Theatre was acquired by Schine in September, 1937. I would now like to correct that. As I read the interrogatory it shows that a 50 per cent interest in the Princess lease was acquired at that time and 25 represents the percentage now held.

Mr. McClennen: That is true. The acquisition from Yulowitz interests was a half, and those two halves became quarters of the whole when the arrangement was made with Messrs. Fine and Essick.

[fol. 1847] The Court: To whom did the other quarter go?

Mr. McClennen: The other quarter remained with Yulowitz.

Direct examination (Continued).

By Mr. Wright:

Q. Mr. Essick, the Medina lease isn't attached to this agreement. I wonder, do you remember what the term of the lease that was referred to there was, when it expired?

A. You mean our lease with the——

Q. No, the Princess lease. I beg your pardon, what the expiration date of the Princess lease was?

Mr. McClennen: Mr. Wright, I find that I have right here a separate copy of that lease.

Mr. Wright: Perhaps we could incorporate that in the exhibit.

Mr. McClennen: I don't quite want to do that, but it can be by reference. That is, if you will just put that in as a separate exhibit with a notation that Exhibit A of your present exhibit is another copy of that.

Mr. Wright: Well, let us have this document marked as 648-Exhibit A. It is Exhibit A which is supposed to be [fol. 1848] attached to this agreement marked Exhibit 648.

(Thereupon the document above referred to was marked as being Exhibit A of Plaintiff's Exhibit No. 648 in evidence.)

Mr. McClennen: You are marking that in evidence now?

Mr. Wright: Well, I assume you want to withdraw it.

Mr. McClennen: I simply want to be sure whether this was just identification or in evidence.

Mr. Wright: The whole agreement, as I understand it, is in evidence, yes.

By Mr. Wright:

Q. Do you recall, Mr. Essick, about the date when the arrangements that are provided in this Exhibit 648 were completed and Schine took over the management of the theatre?

A. I imagine sometime in April.

Q. Of 1939?

A. Of 1939.

The Court: You are speaking now of the new theatre?

The Witness: Of the pooling arrangement referred to, that is right.

Q. Then when the pooling arrangment was completed, what was done with the Princess Theatre?

A. I am just trying to think. I think that the theatre [fol. 1849] was operated for, oh, I think maybe quite a little space, maybe a period of six weeks or two months, if my memory serves me correctly. I really could not tell you definitely.

Q. You think it was about six weeks or two months?

A. I think along those lines.

Q. Then what happened?

A. I think the theatre was closed. Then I think they reopened again for a period, I can't tell you how long, I can't just recollect.

Q. It is closed now?

A. It is closed now, that is right.

Q. Do you know how long it has been closed?

A. Oh, I would say that the theatre, perhaps, would be opened off and on for the last—I would say, perhaps, closed

definitely the last three years, I imagine. I want you to understand I am just merely guessing at it. I really don't know definitely, but I think about the last three years it has been closed.

Q. Prior to that time was it closed most of the time?

A. You mean prior to our——

Q. Well, the last three years would be the period beginning in 1941; I am talking about the years 1939-40.

A. You mean when we first operated? I think the theatre was opened quite sometime and closed up and reopened and [fol. 1850] closed up. It has been operated off and on. I could not tell you.

Q. Now, was anything other than the lease on the Princess Theatre contributed to the pool by Schine and Yudelowitch?

A. Yes, sir, whatever their assets were in the Princess Theatre.

Q. You mean the lease, plus whatever equipment was in it?

A. That is right.

Q. Anything else?

A. I don't know of anything else.

Q. I think you referred, when I examined you yesterday afternoon to the $1500 figure referred to in your letter to Mr. Connors as being a booking fee, and I call your attention to the fact that the agreement provides a fee of $40 a week, which would be something around $2000 a year?

A. No, pardon me——

Mr. McClennen: Just a moment. He did not refer to it as a booking fee.

Mr. Wright: I understood him to do it.

Q. If you did refer to it as a booking fee you were mistaken?

Mr. McClennen: Just a minute. He didn't.

[fol. 1851] The Court: Let him ask what it was now. Was it a booking fee, the $1500?

The Witness: No, it was not.

By Mr. Wright:

Q. The $1500 referred to what?

A. The $1500 is referred to as a part that had been received after certain things had been met with, like the

expenses, which included the expenses of the booking fee for the Schine Enterprises, and then we had a splitting arrangement on the next certain amount. I can't just remember the figures. I think $3000. And then the next $1500 went to us, too, I think, to off-set our investment. I think that is correct. I don't know.

Q. To off-set your investment, that was the figure that you referred to in the letter when you said that you wanted $2000 and you only got $1500?

A. That is right.

The Court: You mean as part of the consideration?

The Witness: That is right.

By Mr. Wright:

Q. Do you recall whether there was any change in the admission prices after the Princess Theatre was closed?

A. I couldn't tell you because they had the operation and I did not pay any attention to the admission price. [fol. 1852] Whatever was being done they handled.

Q. That is, by the agreement, the management was turned over to Schine?

A. That is correct.

Q. I believe you testified yesterday that after the first few months of your operation of the Medina it began to lose money; is that right?

A. That is correct.

Q. Did those losses continue up to the time that you made the pooling agreement and Schine took over?

A. That is correct.

Q. During that period did you have any conversation with any of the major distributors with reference to getting second-run films for the Medina Theatre?

A. I did with Mr. Connors in New York.

Q. When was that?

A. I would say that would be sometime in June or July of 1938.

Q. Who was present at that conversation?

A. Well, I recollect that it was Mr. Connors and myself. I don't know whether Mr. Fine was along with me at that time in his office or not.

Q. What was said then?

A. Well, I came in again to see him in reference to getting a split on the Metro product and he told me it was

[fol. 1853] just utterly impossible, so that I said, "If this thing continues the way it is continuing I am going to go to a second-run at 15 cents and you are going to sell us."

Q. What did he say?

A. He said to me, "Now, Perce," he said——

Mr. McGlennen: This is subject to our general objection.

The Court: Yes.

A. He said, "Now, Perce, let us not get into any arguments down there." He said, "Why don't you fellows get together and get into some pooling arrangement, some satisfactory arrangement? This seems to be a headache to us. It must be a headache to you." I said, "There is one thing we are not going to do; we are not going to be kicked around down there", and that was the end of the conversation.

The Court: You went into this yesterday, Mr. Wright.

Mr. Wright: I asked him specifically with reference to the second-run today.

Q. Is this the same conversation you testified to yesterday that you had with Connors in the summer of 1938 or is this a different one?

A. No, I think I testified yesterday to a conversation with Mr. Connors with reference to the time we were in New York in 1936, in November of 1936, or December of 1936.

[fol. 1854] The Court: You said in the summer of 1938.

Mr. Wright: You gave testimony yesterday with reference to a conversation with Mr. Connors in the summer of 1938.

The Witness: That was later on in November or December that I talked to Mr. Connors again. A definite arrangement was made to have a meeting with Mr. Schine. This was in the summer time.

Q. This conversation with reference to the second-run preceded those conversations?

A. That is right.

Q. You have had experience, have you, in operating other theatres?

A. That is correct.

Q. You have been able to operate them successfully, have you?

A. I would say so.

Q. How many other theatres were you interested in at the time you were operating the Medina at Medina?

A. I think about the same amount we have today.

Q. How many is that?

A. Eight other theatres besides the Medina.

Q. What was the cause of your losing money there in the Medina Theatre while you were operating it?

Mr. McClennen: That is objected to.

The Court: I will let him state the facts, whether the [fol. 1855] attendance decreased.

Mr. Wright: If the Court please, of course it is a conclusion as to why the theatre lost money, but I submit that there is not anybody more competent than he is to draw that conclusion. He knows. He was operating the theatre. He knows what the fact is and the circumstances which were causing him to lose money. That is all I have asked him to state.

Mr. McClennen: If your Honor please, there is a more fundamental question than that involved here. This is not a civil suit by a private individual for damages, where the consequent loss may become a material thing. If what we did violated the Act it makes no difference whether or not the money damage was sustained by a private individual. If what we did did not violate the Act it makes no difference how much was the loss resulting from our conduct, and therefore the connection of the damages to this theatre with the things done by the defendants is not in any respect material in this case. That is, whether the financial loss [fol. 1856] of this theatre resulted from something that we did that we ought not to do, or whether it resulted from having too much theatre space in too small a town, is of no consequence in this case by the Government for dissolution of the circuit.

Mr. Wright: If the Court please, I agree that the precise amount of damage is of no significance in this case. Apparently Mr. McClennen and Mr. Rogers entertain different theories as to the significance of testimony regarding losses. Mr. Mooney was cross-examined at some length on what his profits had been before Schine came into the town and what caused these losses afterwards. If no claim is going to be made that the unsuccessful operation of the theatre— that is, if the defendants are not going to claim that the unsuc-

cessful operation of the theatre was due to causes other than the product shortage then there is no occasion for the testimony. If they are willing to stipulate that we do not need to ask it.

[fol. 1857] Mr. McClennen: There is no occasion for saying to the Court that there is any difference of views between Mr. Rogers and myself. There has been no such apparent difference of views in any respect, and it has nothing to do with this case if there were any. I am addressing the Court on the substance of the merits of this case and I am not making any concession or saying anything with respect to this except what I did say, namely, that whether this unsuccessful operation of this theatre was due to the fact that there were two theatres in town at this time, or was due to the fact that we did something wrong, is not material in this case. If we did something wrong we ought to be stopped. If we didn't do anything wrong we ought not to be stopped, regardless of the consequences to any other private individual, thus radically distinguishing this case from the many cases of suits for private injury resulting from the public wrong. It makes no difference whether this concern was injured or not. The question is [fol. 1858] whether what we did was right or wrong under the statute.

The Court: I do not just follow you. I think his reasons are directed to the question of the shortage, the fact that they could not get certain films or pictures through some understanding or agreement with the Schine defendants, and that, it seems to me, is material. It goes to the very fundamentals of this suit, does it not?

[fol. 1859] Mr. McClennen: I should respectfully submit that it wasn't, for this reason; if we had the right to buy in the market the run of these distributors and the fact that we did so had an injurious effect upon this particular other distributor, makes no difference in this case.

The Court: Standing alone that is quite true.

Mr. McClennen: Now, on the other hand, if we didn't have the right to buy those pictures under the statute, then it makes no difference whether it hurts this particular distributor or not in a financial way; we ought to be stopped from doing such a thing if it is wrong.

The Court: Well, I don't follow your argument there. The very question of your right to buy involves the very question here, the very charge here, the question of your

right to buy to the exclusion of somebody else. Of course, standing alone, you may well say, or you might say that this man had a right to buy the pictures he could buy. The question here goes farther than that. The question would be what is back of the buying.

[fol. 1860] Mr. McClennen: I think I have so poorly expressed what I had in mind that I haven't made it clear. What our submission to your Honor is, we say whether it is dealt with alone or in conjunction with other facts, if we had the right to buy, if we bought in a way that did not violate the statute in any way, it makes no difference whether this particular concern was injured. On the other hand, if we did buy in a way which violated the statute, so far as this suit for an injunction by the United States is concerned, it makes no difference whether in fact that hurts this particular distributor. It is the right or wrong of our total conduct.

The Court: Your argument is right at the other end. You might say the question of the right to buy depends on the circumstances. Under some circumstances it might be strictly legal to buy and you have the right to buy and under other circumstances you might not. The legal chain of circumstances is shown by your violation of the Section.

Mr. McClennen: We make no contention to the contrary of that, if your Honor please. I am dealing with an entirely [fol. 1861] independent question,

The Court: I think the testimony is competent. When the question was first asked I thought it was directed to some other answer. I will let him answer and see what it is. He may answer.

The Witness: Would you please state the question again?

By Mr. Wright:

Q. What was the cause of your continued losses during the period of your operation of the Medina Theatre?

Mr. McClennen: That is the question objected to.

The Court: Yes.

The Witness: The amount of pictures which we had and the quality.

The Court: The amount of pictures and the quality?

The Witness: That is right.

Mr. Wright: You may cross-examine.

Cross-examination.

By Mr. McClennen:

Q. Mr. Essick, the lease to your organization, which is attached as Exhibit B to your final agreement with the Schine and Yulowitch interests, and others, is dated January 18th, 1938; is that the date on which the—what I will call your theatre opened?

[fol. 1862] A. Our theatre opened up on January 1st, 1938.

Q. You have made some investigation so that we may rely on that as the precise date?

A. That is right.

Q. At the time that theatre opened there had elapsed four months of the releasing season, had there not, of 1937-38, in which there was no theatre in Medina, except the Princess in which pictures could be shown?

A. I would say three months of the year 1937-38.

Q. Wasn't it September, October, November and December?

A. That is right, but sometimes pictures aren't always released in September.

Q. The releasing season begins September 1st, doesn't it?

A. That is right, but some companies don't always release in September.

Q. The releasing, is my question.

A. I would say about that time.

Q. Four months of the releasing season had elapsed, that is correct, isn't it?

A. No, I would differ with you, I would say three months of the time.

Q. Were there no pictures of any of the major distributors of the season 1937-38 released in early September, 1937?

A. Could you state that question again?

Mr. McClennen: Would you read the question?

[fol. 1863] (Last question read.)

The Witness: If I get your question correctly, there was pictures released by the producers.

Q. And substantially all the pictures released for the first time by the major distributors, after September 1, 1937, were of the 1937-38 season, were they not?

A. That is correct.

Q. And, of course, we are not in disagreement that September, October, November and December make four months or a third of a year?

A. That is right.

Q. Now, in addition to that in some seasons some of the releases of, for illustration, the 1937-38 season, are released as early as August of 1937, are they not?

A. I would say occasionally.

Q. When was your attention first directed to the business possibility of going into Medina, what date, approximately?

A. I would say some time in the early fall of 1936. I had passed through the town prior to that a number of times because we had a theatre in Gallion, Ohio, and I stopped there to purchase some refreshments, some kind of a drink or so, and I had always gone through the town on an average of at least once a month for years.

Q. Had you gone into the town or had concerning the [fol. 1864] town any even casual consideration of going in there as a business operation before, we will say, September of 1936?

A. No, because business had been too bad for me to contemplate anything for 1936.

The Court: What is the answer?

Mr. McClennen: "No, because business has been too bad for me to contemplate anything before that."

Q. Who was the person who first presented to you the idea of undertaking any business relation with that town?

A. I can't just recall, I think two or three people called me from the Masonic group, and I can't just remember the name of one of them.

Q. That is as between you and Mr. Fine, the information came to you first from the Masonic group?

A. I think that is correct.

Q. And up to that time you had not considered the place as a business possibility for you?

A. No, because I stated I wasn't—business was too bad for me to——

Q. Don't understand me as criticising in any way. I am just trying to find out and get the dates fixed. At some — did you have some conversation with Mr. Yulowitch or Mr. Willis relative to the theatre business situation in Medina?

A. Stenographer, repeat that question again, please?

[fol. 1865] (Question read.)

The Witness: You refer to prior to September, 1936?

Q. If it was such?

A. Oh, I saw him every month or so that I run into him in the exchanges.

Q. And discussed with him in any way the situation in Medina?

A. That is right.

Q. Have any talk with him about the possibility of buying him out or going in with him?

A. No, we only discussed it because we built a theatre and completed it in 1936 in Ray, Ohio, which is 9 miles away, and he came down to see our new theatre and liked it very much. I did not discuss with him any business in his town, but outside of he said business was fair, that was all there was to it.

Q. In any of those conversations, did Mr. Yulowitch tell you what pictures he was showing in his theatre?

A. No, prior to 1936 I didn't know what he was showing, because I wasn't that much——

Q. Well, in 1936 did he tell you?

A. No, I found out for myself in the latter part of 1936 what he was running.

Q. And that was before you had had any talk with Mr. Yulowitch with reference to any possibility of buying him out or going in with him?

[fol. 1866] A. I never discussed buying him out prior to September, 1936.

Q. Discussed?

A. I had never discussed buying him out or anything else prior to September, 1936.

Q. Did you at some time after September, 1936?

A. Never discussed buying him out.

Q. Discussed going in with him?

A. I discussed going in with him.

Q. When did you discuss going in with him?

A. After I began to look into the situation.

Q. Try and fix the date as best you can.

A. I would say I met with him from the time I met him, I must have met with him on half a dozen different occasions.

Q. The first time on this subject of going in with him?

A. I wouldn't want to place the date, but it was some time after September when I became acquainted with the situation in Medina.

Q. Was it in October, possibly, of 1936?

A. I wouldn't just want to say, because I met him so many times from September on, I met him so many times I don't want to say.

Q. I want you to have it in mind; it may become of importance to the Court to know as near as possible when it was; tell us as best you can when it was.

[fol. 1867] A. I can't put my finger on it, I couldn't say.

Q. We don't want you to put your finger on it, we want to give your best recollection within what period it was.

A. I could not say. I would say I met him at least six or seven times after I went down and talked with the Masons because he was a member of the Masonic Lodge and knew what was going on.

Q. And you talked with him about the subject of going in with him?

A. No, I talked with him in reference to he going in with us.

Q. I beg your pardon?

A. That is, after we completed the deal.

Q. You don't want to create any impression of the tail wagging the dog in this matter, do you?

A. I don't think that is necessary.

Q. When did you discuss Mr. Yulowitch going in with you?

A. During these times that I was talking with the Masonic committee.

Q. That is before you had come to a trade with them?

A. That is correct.

Q. Well, now, you came to a trade with them in a substantial sense about March of 1937?

A. No, we were—we had made a deal with the committee. [fol. 1868] I was dealing with the committee entirely. It was ahead of that.

Q. When did you commit yourself to the committee so that you would be welching if you didn't go into an arrangement with them?

A. I would say the latter part of December or the first of January. We were building another theatre in Akron, Ohio, and I was going back and forth.

Q. Well, then, as you have said that you talked with Mr. Yulowitch about the possibility of his going in with you

before you came to a trade, it means that some time in the fall of 1936, you had had such a discussion with Mr. Yulowitch?

A. I had.

Q. At that time when you talked with him on that subject, had you already learned what product was being played in the Princess Theatre in general?

A. I had.

Q. Now, at that time you and Mr. Fine, or concerns in which you were both interested, were independent exhibitors in this industry, were you not?

A. I would say that we were.

[fol. 1869] Q. And as it is understood in the industry an independent is an exhibitor operating a theatre in which no producing company has an interest; is that correct?

A. I think that is correct.

Q. You and Mr. Fine at this time were financially interested as exhibitors in how many different theatres—and by "this time" I mean the fall of 1936?

A. I imagine about the same amount I am today.

Q. That is how many?

A. Nine theatres.

Q. You were interested in nine and Mr. Fine was interested in how many financially?

A. I wouldn't want to state. Do you want me to guess?

Q. I want you to indicate your state of knowledge.

Mr. Wright: Mr. Fine will follow Mr. Essick to the stand.

The Court: State as nearly as you can tell.

A. I imagine between 15 and 20 theatres. I just don't know what his partnerships are.

Q. Of those 15 or 20 are any of them part of the nine that you speak or does it mean as between you 29 theatres in the aggregate?

A. I would say that the nine I referred to, he's interested in some of those theatres in the nine that I have.

Q. And also interested in 15 or 20 others?

A. That is correct.

[fol. 1870] Q. Those theatres are located in, or in the vicinity of, Cleveland, Ohio, mainly?

A. In a radius.

Q. Within a radius of how many miles from Cleveland?

A. Our farthest theatre away is at Gallion, Ohio, which is around 94 or 100 miles away from Cleveland.

Q. What number of the 29 or so would you say were in what you would call the metropolitan radius of Cleveland, regardless of any political divisions?

A. I would say the majority.

Q. Perhaps 20 or the 29?

A. I would say so.

Q. The committee of the Masons had approached you solely on the subject of taking up the operation of a theatre which might be constructed into the Masonic Temple, which was then under consideration for alterations?

A. I would say that was correct.

Q. By the way, when that theatre finally did come into being, it was sometimes called the Temple Theatre and sometimes the New Medina; is that right?

A. No, our nearby theatre was the Medina Theatre. The name of our company was the Medina Temple Theatre Company.

Q. Wasn't there more or less frequent, whether accurate or inaccurate in use, reference to the Temple Theatre?

[fol. 1871] A. No, I don't know what the people called it. The name of our theatre was the Medina Theatre.

Q. When we find it in some of the contracts that have been referred to the New Medina that means your theatre?

A. That is right.

Q. Having under consideration this possibility of going into Medina this way, you talked with Mr. Yudelowitch on the subject of his coming in with you?

A. That is correct.

Q. And what did you say to him?

A. Well, that would be pretty hard to say because we talked quite at length. I tried to influence him to go along with us, that it would make a good set-up for the town and various arguments that I could possibly use to influence him to be along with us.

Q. In the course of those discussions did you tell him that if he didn't come along with you you were going to put a new theatre into the town?

A. That is that we were going to?

Q. Or that there was going to be a new theatre put into the town, which you were going to operate?

A. No, I didn't say that. I said, "There is going to be a new theatre in town, regardless of who has it, and I would like to get together with you so that we can take it. If we don't take it somebody else will."

[fol. 1872] Q. You talked with him about the fact that if he didn't go in with you you were going to be interested in another theatre to be built in the town?

A. No, I was only interested in the one theatre, the one the Masons were going to construct.

Q. And you told that to Mr. Yudelowitch, didn't you?

A. I was going to try to make a deal with the Masons; that is correct.

Q. You told that to Mr. Yudelowitch?

A. Yes, that is right.

Q. And you told him that in the fall of 1936?

A. That is right, when I was down there.

Q. In what way did you suggest to him that he come in with you?

A. In what way?

Q. Yes.

A. Well, I told him that to be absolutely fair and above-board with him, that we would go to the bank or to the Masonic Order and whatever deal is set up I would ask their approval, because he would be the first consideration of anything that we would do, because he was already in the town and I wanted to cooperate with him in the fullest way. I even had him meet a partner of mine, my partner in Berea, Ohio, which he and Ben were very, very friendly.

[fol. 1873] Q. Ben being Mr. Yudelowitch?

A. Yes.

Q. By the way, he has died, in 1943?

A. That is correct. And they were very friendly, and he wanted to know what the operation was, how we got along.

Q. In that conversation in the fall of 1936, when you proposed that Mr. Yudelowitch come in with you, was it to be for the operation of the Princess Theatre, for the operation of the prospective theatre and the Princess Theatre, or for the operation of the prospective theatre only?

A. It was for the operation of both theatres, because he told me that he had owned the property of the Princess Theatre and that he would want a certain stipulated rent, regardless of what the success was of the new theatre, or whether it was going to be a success or not. I said, "Well, Ben, we will draw a contract", and that is where we had met in the bank on a couple of occasions to discuss those things, what would be fair as a rental."

Q. Did you discuss with him whether if you took this property from him under lease at what you might arrive at as a fair rental you would then operate the Princess Theatre, or that you would operate only the new theatre? [fol. 1874] A. No, we would operate both theatres, or see what would be the best policy after we had got into the town, what would be the best policy.

Q. You had in contemplation in the discussions with the Masonic committee how large a theatre in seating capacity?

A. We knew approximately the area of what was going to be the capacity of the proposed theatre.

Q. That is just what I am asking you, what it was.

A. It was between 900 and a thousand seats.

Q. And according to the rough working conceptions of theatre exhibitors that alone is enough seating capacity for a town of Medina's size?

A. I would say that was a good-sized theatre for that town.

Q. Well, it was enough seating capacity alone for a town of that size, wasn't it?

Mr. Wright: If the Court please, the question as to what seating capacity is enough it seems to me is getting into a pretty abstract field. I suppose the more seating capacity a town has the better off it is. I don't know what he means by enough or not enough.

The Court: You said he is an expert.

Mr. Wright: He is an expert operator. I do not know [fol. 1875] whether he means enough from the standpoint of making enough money for the operator or enough from the standpoint of service to the public.

The Court: I assume he refers to service to the public. He may answer.

(Question read.)

A. We didn't exactly know that. We knew that was a big enough theatre that we contemplated building.

Q. You thought that it would provide enough seating capacity alone for that town, did you not?

A. For that particular theatre.

Q. For that particular town?

A. For that particular theatre that would be a——

Q. I am speaking of the town.

A. We didn't know that, because we didn't know what the possibilities were.

Q. You were experienced exhibitors, acquiring theatres from time to time in different places, or constructing theatres?

A. That is right.

Q. Accustomed to getting an idea of whether a town was over-seated or not?

A. The building laws——

Q. Just a moment.

[fol. 1876] A. We didn't know that. I will state again, we didn't know. That was large enough for that theatre.

Q. You haven't observed the question. Will you read the question again?

(Question read.)

A. Well, I have got a lot of ideas but they don't always prove out.

Q. One of the ideas that has sometimes proved out in your experience has been that a town was over-seated, hasn't it?

A. I wouldn't say that because in the town adjacent to ours we operated the new theatre and the other theatre for quite sometime. That was one of the things that Ben and I discussed, whether we would keep the little theatre open with the big theatre or run it on the week ends with action pictures. We didn't know that, but we knew the size of the theatres of a thousand seats, or close to that, was a big enough theatre at that particular time.

Q. And the reason that you discussed with him the question of whether you would keep the theatre open or not was because you thought there was a good prospect that this new theatre would be all that the town would fairly support?

A. I would say ample for the town.

Q. The Princess theatre was not ample in size for the [fol. 1877] town, was it?

A. Well, I didn't think so.

Q. Well, now, when you were talking with Mr. Yudelowitch in the fall of 1936 about the question of the amount of rent that you should pay him did you discuss anything about the question of whether the lease should require that the theatre, the Princess, must be operated or not?

A. We discussed mostly the rental on the new theatre. Of course whatever was fair, as far as his theatre was concerned, we arrived at that with the bank.

The Court: What?

A. It would be arrived at—in other words, we were meeting with the bank down there, and, in other words, I would rather have somebody else in the deal so that we could set a fair valuation and a rent for his investment, so that he would be protected as far as his theatre is concerned whether it was opened or closed.

By Mr. McClennen:

Q. So that he would come out not the loser, even if he leased the Princess to your group and the Princess was closed, he would get his rent anyway?

A. That is correct.

Q. What you wanted the Princess for was so that you [fol. 1878] would not be hampered in your proper operation of the new theatre?

A. That is correct.

The Court: What do you mean by "hampered in the operation"?

The Witness: Obstructed in any way, because a theatre of that size can be varied, because they can cut admission prices and they can do a lot of things that can harm the other theatre, and the best operation would be for the theatres to be together so that you can control the situation.

By Mr. McClennen:

Q. This Princess Theatre, Yudelowitch and Willis, and their associates or some of them, were not merely the lessees of that theatre, they were also the owners of that theatre?

A. That is what they told me and I took that for granted.

Q. That is, you conducted your discussions on that basis?

A. That is right.

Q. In the fall of 1936 did you also discuss with Mr. Yudelowitch the question of who should be the managing operator of the new theatre if the Princess was closed?

A. He would manage the theatres.

Q. What?

A. He and his partners would manage the theatres.

[fol. 1879] Q. He and his partners would manage the theatres?

A. That is correct. That was part of the understanding, because, after all, the job was in the town and that was the primary reason.

Q. In the course of those discussions did Mr. Yudelowitch tell you that he and Mr. Willis were thinking of building another theatre themselves in the town?

A. He told me that he had a lot there and that they were contemplating at some future date building a theatre.

Q. Did he tell you anything about how soon that was to be?

A. No, he said he thought the town was not ripe enough to have a theatre.

Q. That is, he thought that the town was not ripe enough for any theatre except the Princess?

A. That is right.

Q. And by "ripe enough", hadn't grown in size and prosperity sufficiently to call for the building of another theatre at that time?

A. That is right. That is where I showed him the situation in the town adjacent, that we opened up in September of 1936, and the size and the whole competitive situation.

Q. In your discussions in the fall of 1936 with Mr. Yudelowitch, in which it was a part of the thing under discussion that he and Mr. Willis would be the local managers, it was also discussed that your circuit would be the buyers and [fol. 1880] bookers of the product for the theatre?

A. That is right.

Q. Mr. Yudelowitch said that he did not want to go in the new project, did he?

A. Well, I never got that information from him at all.

Q. Well, when you closed at the end of December with the Masonic group—I don't mean the actual execution, but when, in the common sense, you were at a trade, you had learned that Mr. Yudelowitch was not coming along with you?

A. No, I never got that information from him.

Q. You never got that information?

A. No.

Q. And in the conversations with him you did make clear that whether he came along or not that you were going ahead with this Masonic group idea of the building of a new theatre to be operated by you?

A. I told him that we were going to go ahead with the deal and that any time that he saw fit, prior to the opening of the theatre, that we would welcome him in joining with us.

Q. You say you go so far as to go to the bank with him and discuss the rents that were going to be paid?

A. On the new theatre.

Q. And what part did he take in those discussions? What [fol. 1881] did he have to say on that subject?

A. Well, he knew the whole entire transaction because he was a member of the Lodge and knew the whole thing, and he figured that the rent we were agreeing to pay was entirely out of keeping with what we could afford to pay.

Q. That you were going to go into a project where you had to pay too much rent?

A. He thought it was too much rent, but I explained to him that being a new theatre in that community and that size town that he would be surprised at the receipts that that theatre would do.

Q. That figure that he thought too much, was that the figure that you did agree to with the Lodge?

A. If I remember correctly, it was. I even went so far as to show the receipts from the town adjacent, that we had done as much in one day as the little theatre had done in a week.

Q. So that he had told you that the rent which you were proposing to pay was too much for a town like that at that time?

A. That is what he kept dwelling on constantly, that it was too much to pay, and he didn't see how we would be able to make ends meet, and I did everything that I could to show him that we could.

[fol. 1882] Q. Of course if you pay too much rent for a theatre you lose just that much more money in the operation?

A. That is correct.

Q. I didn't quite hear your answer.

A. I say that is correct.

[fol. 1883] Q. So that by the beginning of January, 1937, Mr. Yulowitch, by reason of his relation to the Masonic body and by reason of his conversations with you, knew that he had got to do business pretty soon thereafter against a new up-to-date large theatre?

A. No, he had all the time in the world because I told him——

Q. What?

A. He had all the time in the world to do business with me, because I told him we would always hold open for him to come in and we would sit down and discuss everything with the bank so he would know he had an opportunity up to the day we opened to make up his mind to come in.

Q. Don't misunderstand me as saying you were not perfectly fair with Mr. Yulowitch, but listen to the question and answer it, please.

(Question read.)

Mr. Wright: If the Court please, it is nothing but an argumentative summary of what is already in evidence.

The Court: Those facts already appear. He said he knew the date he was opening the theatre and he said he knew he was opening the theatre.

Mr. McClennen: I expected the answer to be directly "Yes, sir", and if it has reached your Honor in that form, [fol. 1884] it serves the same purpose.

Q. Mr. Yulowitch, in his conversation with you, expressed a desire to go on and operate his own old Princess Theatre, did he not?

A. No, I never got that word from him.

Q. What?

A. I never got any word from him. All I was talking about was him going in and what he was going to do I didn't know.

Q. And he didn't say anything to you to the effect that he wanted to go on operating the Princess Theatre there with the thought that was enough for the town?

A. No, I never got that from him.

Q. But he did tell you that he thought the Princess Theatre was enough for the town, as far as the town had been developed?

A. He may have said that, I suppose, talking about—he said business——

Q. He may have said that in substance, didn't he?

A. No, he realized the town needed something, but he was very much afraid a new theatre would be too much, too much rental, too much overhead and higher prices.

Q. In the course of that answer, you said that you imagine that he did; the reason that you imagined he did was that he did, wasn't it?

[fol. 1885] A. I can't tell you definitely what was in his mind because he was more or less wishy-washy, so I told you I took him over to the town nine miles away and showed him the new theatre and what was happening, what the box office of the theatre was doing, to convince him the town needed a new theatre and he should go on with us.

Q. Was there any reason that he expressed to you why he was cool on your proposition except that you were going to have to pay too high a rent for a theatre that wasn't needed in the town?

A. I just can't say he was cool, because he knew what was going on. I explained to him there was going to be a theatre regardless of whether we took it or somebody else would take it there, and told him to make up his mind and we would give him all the opportunity in the world. I don't know what his thoughts would be.

Q. Now, you had learned at the time of this too large rent conversation that Mr. Yulowitch had and had had for a length of time, for his theatre, the first-run of the Metro product?

A. I knew what film he was playing.

Q. And of the Paramount product?

Mr. Wright: He has already testified to that on direct. I should think we don't need to go over it again on [fol. 1886] cross.

Mr. McClennen: My views of necessity are different from yours.

(Question read.)

The Court: He said he knew what products he had.

Mr. Wright: He named them, also, if the Court please.

The Witness: Of necessity——

By Mr. McClennen:

Q. I don't quite get from your answer whether you did know that he had had the first-run of the Paramount product.

A. I knew all the film he had there.

Q. Including the Paramount product?

A. Yes, sir, I knew what the films were.

Q. And Fox product?

A. That is correct.

Q. And R. K. O. product?

A. Correct.

Q. And the Republic product?

A. He only had, he only played a few pictures with Republic.

Q. You knew that he had the Republic product? I don't mean that he had every picture, but he was playing the Republic product?

A. That is right.

Q. How about the United Artists?

A. He didn't have United Artists.

[fol. 1887] Q. He didn't have any United Artists?

A. From my talk with him he may have had a picture occasionally, but not as——

Q. Did he tell you that he hadn't had any United Artists?

A. He said he didn't play United Artists.

Q. He said he didn't play United Artists and you knew that he had none of the Columbia, Universal, Warner or United Artists?

A. That is correct.

Q. You knew that those pictures were uncommitted in the town?

A. That is right.

Q. And you knew that notwithstanding that fact he was playing some Republic pictures, is that correct?

A. That is right.

Q. Did you discuss with him why he played Republic Pictures?

Mr. Wright: If the Court please, what possible relevancy could this have? We have expressly limited the issues in the complaint to the major product by the complaint itself. We haven't gone into any of these other minor companies or attempted to show what has happened in that connection. I submit it is not properly part of the case at all.

The Court: I don't know whether it is relevant, but on cross-examination——

[fol. 1888] Mr. Wright: We certainly asked nothing about Republic on direct.

The Court: No, you went into the question of the product.

Mr. Wright: This calls for a conversation between him and Mr. Yulowitch as to what they said about the Republic product which seems definitely outside of the issues of the trial.

The Court: You asked him——

Mr. McClennen: I asked him if he discussed with Mr. Yulowitch why he played Republic product when all of these majors were open.

The Court: Go ahead.

The Witness: Republic had a western star, I think Ken Maynard and Gene Autry, that he played, I think they released six——

Mr. Wright: I suppose it is fairly obvious whatever he played he played because he wanted to play it. It is a complete waste of time.

By Mr. McClennen:

Q. That is, that he played those Republic pictures because he thought they were, to that extent, the best thing for the town requirements in that theatre, is that it?

A. He played Gene Autry, I think that was possibly one of a series he played. I don't know whether there was anything else or not. That was always a good western [fol. 1889] star for Friday and Saturday. I know he got western pictures.

Q. You got nothing from him to indicate that his purchase of Republic pictures was because he was forced to it, because of the lack of other product?

A. I don't get your question.

Mr. Wright: If the Court please, this is a pure argument, not in the case at all.

The Court: It appears already what product he did have, that he wasn't forced to take United Artists because of the lack of product.

Mr. McClennen: If it so rests in your Honor's mind, that covers all we had in mind in asking the question.

Q. When you completed your arrangement, I don't mean the execution of the papers, but when you came to an agreement in the common sense with the Masonic group, to go forward with this project, there was then no understanding that Mr. Yulowitch would be in that project, was there?

The Court: He has already said that. I think he has already answered that question.

Mr. McClennen: I so understood, but I wanted to make it perfectly clear.

The Court: Yes, he had nothing.

[fol. 1890] Q. When did you firmly agree on paper with the Masonic people, that is, when was your agreement executed?

A. I really couldn't say.

Q. You haven't the agreement here?

A. No, I haven't.

Q. Have you seen it?

A. You mean the definite lease?

Q. The definite, well, I will answer that by asking you, was there any definite agreement made until the lease of January 18th, 1938?

A. I can't tell you positively.

Mr. Wright: May I ask you, are you referring to some exhibit in evidence?

Mr. McClennen: I am referring to the Exhibit B of No. 648.

Mr. Wright: Thank you.

The Court: He said he opened on the first of January.

Mr. McClennen: Yes, your Honor. I am trying to find out when the paper transaction took place. That is the very thing I am leading to, and I am asking him if there was any definite agreement on paper prior to the lease of January 18th, 1938.

The Witness: Well, I know we started building in the latter part of February or the first of March, and during [fol. 1891] the course of the building we had—there was two or three things that were going along because they were supposed to have built the building themselves and for some reason, somebody took sick, and they had another meeting of the lodge, and things were all changed around, and finally they agreed to advance $30,000, I think that is the amount, and we would finish the building for them. Now, there was all different kinds of things that cropped up, and I could not tell you the exact date, but I know we started the building in the latter part of February or the first of March, 1937.

Q. And when that building started, had there been any agreement signed as far as you can now recall?

The Court: Up to February, 1937?

The Witness: Must have been some sort of paper. We didn't just go ahead and build on their property without something, I don't know what it would be, what agreement, because I really cannot tell you now.

Q. As far as your recollection serves you, you can't assure us that there had been a written agreement with them signed, is that correct?

[fol. 1892] A. I wouldn't swear to it, I wouldn't say.

Q. Now, the idea on which the building operation started was modified in the matter of who should really do the building in the substantial sense, whether it should be the lodge or you?

A. No, they started——

The Court: I don't see what relevancy this has. The question is what was done after. We are not concerned with the building, are we?

Mr. McClennen: I was leading up to asking another thing that has been made relevant, but I will jump without more ado.

Q. You have stated the amount that you expended in the building of that theatre and equipping it, or altering the building and equipping the theatre and the total of what you and Mr. Fine and your group were out of pocket for that?

A. That is correct.

Q. And that is the amount which is recited in Exhibit No. 648, as $53,253.56?

A. If that states it, it is correct.

Q. Now, going out of order of dates and jumping to that, the rough of the arrangement as expressed in this agreement was that the Schine and the Yudelowitch interests contributed the lease and equipment of the Princess Theatre [fol. 1893] without any separate item of money on that account, and you contributed the lease of the new theatre and its equipment and the stock interest was to be divided one-half to you and Mr. Fine's group and one-half to the Schine-Yudelowitch group. After the payment of operating expenses the first $3,000 of profit was to be divided $1500 to your group and $1500 to the Schine-Yudelowitch group?

A. That is correct.

The Court: I thought he said in the first, the $1500 payment was to be $1500 to him and the second $3,000 was to be divided?

Mr. McClennen: In final incidence it was, but not in the order of payment. That is, the first $3,000 was to be preferred before we come to the next item.

Mr. Wright: If the Court please, it is all set forth in the agreement. I don't see what is to be served by covering it again orally.

Mr. McClennen: I think the same sort of things that were served by you asking the same questions.

Q. After that $3,000 was divided half and half, then the profits up to the next $1500 were to be to you annually to go to the retirement of this $53,000 that you had put into it?

[fol. 1894] A. I can't tell you it was retirement, I know we were to save $1500, whatever the contract states, I suppose that is so.

Q. Then the profits, whatever they were after that, were to be divided equally between the two groups?

A. I presume that is correct.

Q. And the thing that you regretted in your letter that has been put in evidence to Mr. Connors was that that retirement payment, instead of $1500 you wanted to be $2,000, that is correct, isn't it?

A. That is what I contemplated settling for, but I didn't get it.

Q. That is so. Now, when did you first get the rumor that the Schine interests were going in with Mr. Yudelowitch?

A. Oh, I would just not want to place my mind on it. I know it was after we had started to build. I don't know how long afterwards. I imagine it run for six weeks or something like that, I don't know offhand.

Q. Did you hear that rumor in March of 1937?

A. I said I could not place the time, but I know it was some time after we started to build.

Q. Did you learn of the fact from Mr. Yudelowitch?

A. No., I never did.

Q. Did you learn of the fact from the Masonic group?

A. No.

[fol. 1895] Q. Just, was it just common gossip of the trade?

A. Hearsay.

Q. As you heard it, was it that Yudelowitch, with this Schine trade, was going ahead with the project of building a theatre?

A. No, sir, I didn't hear that.

Q. Did you never hear that he was going to build a theatre?

A. Did I hear that he was going to build a theatre?

Q. Yes.

A. You refer to whom?

Q. The Yudelowitch-Schine group?

A. I heard that.

Q. When did you hear that?

A. I think it was in around June of 1937.

Q. When you heard of it did you communicate, yourself, in any way with Schine group?

A. I heard that after I had met with the Schine group in Gloversville.

Q. When was it that you met with the Schine group in Gloversville at which you heard of this?

A. It was very hot, so I put the time as around June sometime, or in July, but I know it was a very, very hot day.

Q. And hadn't you heard from Mr. Fine or from the Masonic group that they, that is, Yudelowitch in connection with the Schine trade, were going to build a theatre?

[fol. 1896] A. How would Mr. Fine know?

Q. No, without my answering your question, I will ask the stenographer to read mine.

(Question read.)

The Court: Hadn't you heard from either one of these?

The Witness: Mr. Fine is my partner. He didn't know anything more about it than I knew about it until we went to Gloversville.

The Court: Then you didn't hear from him?

The Witness: I didn't hear from him, no.

By Mr. McClennen:

Q. Did you hear from the Masonic group?

A. No.

Q. Did you have any talk with the Masonic group or any of them on that subject?

A. Not that I recollect.

Mr. McClennen: Will you mark this paper for identification?

(Thereupon the document referred to was marked as Defendants' Exhibit No. 45 for identification.)

Q. Had you had any talk with the Masonic group on the subject of another proposed theatre to be constructed by the Yudelowitch-Schine interests? Had you heard of that before March 25th, 1937?

A. They didn't discuss it; that is what we discussed, that [fol. 1897] they had that lot there and contemplated building some time.

Q. But had you heard they contemplated building right away?

A. I don't remember that, you mean that Yudelowitch was going to build right away?

Q. Yes.

A. I know we discussed the fact that he had the lot there and had his property there for that purpose.

The Court: What is the date of the Schine purchase in the Princess?

Mr. McClennen: The date of the concluded agreement is March 18th, 1937.

Mr. Wright: If the Court please, now we subpoenaed that agreement. It wasn't produced. We read into the record the answer in the interrogatory which shows Schine acquired its interest in the Princess in September, 1937. I don't know what is the purpose of offering testimony here. The date in the record now is September, 1937.

Mr. McClennen: Mr. Wright, let us proceed with the graciousness that we should receive from a representative of the United States. I am offering no testimony in the record. The Court asked me the date of the agreement, [fol. 1898] and I thought it was courteous to answer it.

The Court: I want to know what the record is, if it is in the record, the question would naturally be directed to the record, if we have a record.

Mr. Wright: The record appears, September, 1937.

The Court: That is the record as shown by the interrogatory.

[fol. 1899] Mr. McClennen: That is not the record of the date of the agreement pursuant to which the interest was obtained.

The Court: The agreement to purchase at the time of taking possession; is that what you mean?

Mr. McClennen: No——

The Court: Read the interrogatory.

Mr. Wright: I read it into the record. It is on page 13 of the answer to interrogatory No. 17-A, which under the heading "Town," is "Medina." "Name of theatre: Princess." "Nature of interest: Lessee." "Extent of interest: 25%," which was cleared up as the present interest. The

one that was acquired was actually 50%. Date acquired: September, 1937."

The Court: Go ahead.

Mr. McClennen: In view of your Honor's question, I will offer the agreement to which I referred in my answer.

Mr. Wright: This is an agreement that we subpoenaed and we were told yesterday when we were asked for it that it was not available.

Mr. McClennen: No, you did not ask for that yesterday. [fol. 1900] It was not available last week, and you haven't asked for it since.

Mr. Wright: This agreement, in any event, is one which I take it is now being produced in response to our subpoena of August 15th, in which we asked for the agreement that had been made with Mr. Yudelowitch.

Mr. McClennen: No, it is not——

Mr. Wright: Does this purport to be such an agreement?

Mr. McClennen: The purport, you can see by reading it, it is in your hands. It is now produced in order for me to make clear the proper answer to his Honor's question.

The Court: Proceed.

Mr. Wright: We have no objection to its going in evidence. We do object to the manner in which it was produced.

The Court: Am I to understand now that you claim the answer to the interrogatory was erroneous?

Mr. McClennen: No, your Honor. This is a preliminary agreement which answers your Honor's question.

The Court: You mean the consummation of the agreement was in September?

Mr. McClennen: At the time when the stock was issued in the new company, so that we for the first time had title, was [fol. 1901] in September, 1937. There is no inconsistency whatever.

(The letter, dated March 18, 1937, referred to was re-received in evidence and marked Defendants' Exhibit D-46.)

By Mr. McClennen:

Q. Now, with Exhibit for identification No. 45 before you, will you tell me whether you learned of the imminent prospect of a building of what I will call the Yudelowitch-Schine new theatre, and learned of it before March 25, 1937? You are at liberty to look at the letter and read it before

answering, or to refrain from so doing, as you may desire.

A. Mr. Yudelowitch discussed with me in all our meetings about building on his project, and I did my best to talk him out of it. I said to him, I said, "Why should you go ahead and build a theatre and spend $100,000 when the Masons are going to build?" I said, "That would be awfully foolish," I said, that was always in our conversation about the building, whether he went to the Masons or not. I don't remember all the conversation that happened at that particular time. I said all I knew about the proposition that comes to my recollection is when I was in Gloversville meeting with the Schine interests.

[fol. 1902] Q. And you had learned from Mr. Yudelowitch of this imminence of another theatre constructed by him, you had learned of that in the winter of early 1937, had you not?

A. We had talked about it a lot of times.

Q. The time.

A. A lot of times we talked about it.

Q. And some of that lot of times was in January or February of 1937?

A. Yudelowitch?

Q. Yes.

A. I talked with him all the time. I don't know what date it would be that he talked about building.

Q. During all the time that you have described was there included December, January and February, or some parts of those months, December of 1936, and January and February of 1937?

A. Well, I know we started to build in the last of February or the first of March, and I knew of no definite—there had been a lot of rumors as far as Ben going ahead with the set-up.

Q. You had heard, before you started to build, that Yudelowitch was bent on his project of building a new theatre?

A. I didn't know what he was going to do because I never [fol. 1903] got any answer from him.

Q. But you knew that he had that project up, didn't you?

A. He had always contemplated building it. I suppose that is the reason why he bought the lot.

Q. What?

A. I suppose he always contemplated building it because he mentioned it in our conversations a number of times.

Q. You had learned by the 1st of March, 1937, that he was contemplating doing it right away, as soon as he could get it financed, didn't you?

A. I don't recall that.

Q. You have no recollection on that?

A. I have no recollection.

Q. When the building of your theatre was begun—the actual physical work of building the new theatre or altering over to create the new theatre—when that was begun you had already heard that Ben was going to build another theatre if he could swing it? When you shrugged your shoulders then was it yes or no?

A. I don't know.

Q. You did not know, you had not heard before the shovel was put into the ground, that Ben was going ahead with his project or threatening to do so?

The Court: He has already answered your question. The question of actually starting the building or putting in [fol. 1904] the first shovel is not important, as far as I can see. You have been all over this several times.

Mr. McClennen: I understand from the witness so far, with the various answers, that he did understand before the building was started that Ben was considering immediately putting up another theatre, if he could swing it.

The Court: He did not say immediately, as I understand. He said he had talked at different times about building a new building, that he had bought a lot, and in substance he assumed he did have that idea. Go ahead.

Mr. McClennen: I want to bring out the fact that he then knew it as an imminent project.

The Court: Ask him the question specifically.

By Mr. McClennen:

Q. You knew it as an imminent project before you actually started your new theatre, did you not?

A. No, I did not.

Q. And you had no talk on that subject with Mr. Fine before the 25th of March, 1937?

A. I had a talk with Mr. Fine?

Q. Yes. About Ben's being bent on going ahead and [fol. 1905] building now if he could swing it.

A. He knew the conversation I had with Mr. Yufdelowitch, that he was always contemplating building a new theatre. When or at what time, I don't recollect that.

Q. Was one of the reasons for starting the building of your theatre at the particular day when it was started so as to be sure to be ahead of Ben's project, if he went ahead with it?

A. Well, we had plans and specifications, plans made up, and stuff like that. We submitted to the Lodge exactly what we were going to do.

The Court: You did not answer the question.

Mr. McClennen: I will ask that the question be answered.

Read the question.

(Question read.)

A. The only thing I can say is that we were building in Akron at the same time and we were combining the two theatres together, and that was the reason that we were getting together, because we had the men available to go from one job to the other.

The Court: You do not answer his question. The question was whether your reason for starting on the date you did was to get ahead of the so-called *por*ject of Ben.

A. No.

[fol. 1906] By Mr. McClennen:

Q. Did you discuss with Mr. Fine the advisability of taking up with the Masonic group their seeing if they could not prevent this catastrophe of having two new theatres put up in the town?

A. Oh, gee, I wouldn't remember anything like that.

Q. You just wouldn't remember? You may have done so and you may not?

A. I don't think I did.

Q. Did you ever hear anything about this letter of March 25, 1937, Defendants' identification Exhibit 45?

A. I wouldn't remember any letter.

Q. Do you think it would help you at all to remember it if you looked to see what it was about? I have laid it before you several times and you have not. Would it help you to remember if you looked at it?

A. I see it is from the Masonic company. I wouldn't know what they were writing about.

Q. The letter tells you what they were writing about, if you will look at it, and then you can tell me whether that was

a subject of discussion with you, whether they should do anything of the kind.

Mr. Wright: If the Court please, what the relevance of all this is is still beyond me, as to who started first or why or [fol. 1907] how. What does it prove or disprove that is in issue in this case?

Mr. McClennen: It depends on the answer what it proves or disproves.

Mr. Wright: Assuming any answer, if he did or if he didn't——

The Court: Whether his effort was to get ahead of somebody else or not.

Mr. Wright: Assuming that he did.

The Court: Unless you seek to show that he was doing things which the Act prohibits, you mean?

The Witness: I never saw this letter. I don't know anything about it.

Mr. Wright: Even if he were I submit that would not be relevant.

The Court: I just put the question. I do not see just the relevance myself.

Mr. McClennen: I show Mr. Wright identification Exhibit No. 45, at his request.

Mr. Wright: Did Mr. McClennen answer your Honor's question? If he did I did not hear it.

The Court: What question?

Mr. Wright: The question you asked, what the relevance of this was.

Mr. McClennen: I was not aware that I had neglected any question of your Honor's.

[fol. 1908] The Court: Counsel raised the question of relevance of this testimony and I asked you whether you wanted to show this for the purpose of showing that this individual was doing the same type of acts which it is claimed were illegal and in violation of the statute.

Mr. McClennen: No, your Honor. The relevancy is this, that I am coming later to the question of when the attempts to get product took place, and that the witness has testified at another time that they took place after he learned of this project. I was trying to fix that date, this project of Schine coming in, and I was merely trying to fix that date in this way.

Mr. Wright: It seems to me that that was fixed an hour ago.

Mr. McClennen: If your Honor please, if you think I should not fix that date——

The Court: I will let him state when he first learned that. You said when Schine was coming in. You have confused that with the question of construction by Yudelowitch and Schine, have you not?

Mr. McClennen: For this reason, if your Honor please: [fol. 1909] I some time ago asked the witness when he learned that Schine and Yudelowitch were on this project, and he answered as to the Yudelowitch part, and has not yet answered as to the Schine part.

Mr. Wright: He answered several times that the first time he learned of that was when he went to Gloversville.

Mr. McClennen: And I am seeking to show that he knew of it in March of 1937. He is not my witness and I do not accept that as the date. If by any means I can persuade him to recall that it was in March, 1937, I urge that I am entitled to do so.

The Court: I think you have already searched the subject to a considerable extent. I think his answers already given cover it but I will let him answer specifically. He has testified, as Counsel said, that he first learned of it when he was up at Gloversville in June or July. I will let you inquire as to when he first learned that Schine and Yudelowitch contemplated the purpose of building.

Mr. McClennen: Then I will put that again.

[fol. 1910] By Mr. McClennen:

Q. When did you first hear the rumor that Schine and Yudelowitch were going in together on this project?

A. I said it was some time after we had started building. I said six weeks or seven weeks after we had started to build.

Q. So that at least two months, if not three, before you met Schine, or went to Gloversville and saw Mr. Schine, you had heard of this fact that Schine and Yudelowitch were in together on this project?

A. That is right.

Q. That is, you knew it at least by April of 1937?

A. Oh, I would say four to six or seven weeks. I wouldn't put any specific date in when I learned it. It was only a rumor, so far as I knew.

Q. You heard the rumors as early as April, 1937, did you not?

A. I wouldn't want to put the exact date. I know it was some time after we had started to build.

Q. You have no recollection that it was as early as April, 1937?

The Court: He has already answered that.

Mr. Wright: Even on Counsel's stated purpose, this has no relevancy. He did not testify to product negotiations [fol. 1911] between April and June, 1937. It does not make the slightest difference whether he knew in April or whether he knew in June.

The Court: Objection sustained.

Q. How definitely can you fix the time by date when you began the actual building?

A. The only thing I can say is the last of February or the first of March. I would not be able to fix the exact date.

Q. And the rumor as to Schine coming in was within six weeks of that?

The Court: He has answered that question. He has made a definite statement, or as definite as he can fix it as to the time. He said it was some weeks after they commenced building, that he couldn't state it more definitely.

Q. It was after you learned of this prospect that Schine was coming in that you made your efforts to get product for your new theatre?

A. I don't understand that question.

The Court: Read it.

(Question read.)

The Court: Going in with Yudelowitch, you mean?

Mr. McClennen: Yes.

[fol. 1912] A. No, everybody knew we were contemplating building. There was talk in the street that we were building in Medina, and we hadn't completed the deal.

Mr. McClennen: Read the question again.

(Question read.)

A. No, I talked to the film companies prior to that. I talked to them during the negotiations I was carrying on, I talked to the companies that were not sold in the town.

Q. I am asking now about the time when you began your efforts to make contracts for product. That was after you had learned that Schine was coming in with Yudelowitch, wasn't it?

A. The only one that I made a definite contract with was with Warner Bros. and First National.

Q. By Warner Bros. and First National, making a definite contract, you are merely stating the conversation to which you testified that you had in December, 1936, with Mr. Kalmenson? That is what you are referring to, isn't it?

A. Yes, and with Mr. Mooney.

Mr. McClennen: If your Honor please, it is hardly worth while asking to have it stricken out. I call your attention to the fact that it is a mischaracterization in the answer that [fol. 1913] it was a contract; that that was the first effort with respect to Warner.

Q. You made no other attempt to get a contract with any major distributor until after you learned that Schine and Yudelowitch were coming in; is that correct?

A. No, I differ with you. I had already talked to the companies that weren't sold in the town, and they told me that as far as the pictures were concerned that weren't sold in the town that they were certainly there for our disposal, but I made no definite contract with them.

Q. And you made no application for a definite contract with them?

A. I did not.

Q. Subsequently you made an effort to get Metro, Paramount, Fox and RKO, did you not?

A. I did not.

Q. You never made any?

A. I did not.

Q. You have some definite way of fixing the date of the Kalmenson conversation as being in December, have you?

A. It was around the latter part of December, in there some place. I can't just lay the exact date upon it.

Q. What is the best you can do for fixing the confines of the period within which that conversation took place? [fol. 1914] A. My conversation with Mr. Kalmenson?

Q. Yes.

A. I would say it would be a period of a couple of weeks, the latter part of December or maybe the first of January. I just couldn't place the exact date.

Q. Would you be sure that it was within two weeks before or after Christmas of 1936?

A. I wouldn't be able to say.

Q. What?

A. I really wouldn't want to say because I don't just exactly remember.

Q. You have no other event, have you, that definitely fixes the time of the conversation?

A. No, I can't just exactly because we were in that contemplated stage down there of building and the plans of the other theatre we were constructing, and back and forth, and I was talking to Yudelowitch and with the different film companies. I really couldn't place——

The Court: He wants to know if you have anything by which you can fix the date.

A. I can't fix the date. I would say maybe the middle of December to the 10th of January. I couldn't say.

Q. But it is surely within that period?

A. Approximately.

Q. You went to the Cleveland office of Warner at that time [fol. 1915] to book some pictures on some existing contracts that you had?

A. That is right.

Q. And those were spot booked pictures, were they not?

A. Those pictures were under contracts for other theatres.

Q. What?

A. Those were pictures that I was booking for other theatres and were under contract.

Q. Do you recall that your theatres did not have the Warner 1936-1937 product?

A. We did not have the 1936-1937?

Q. Yes.

A. I was booking pictures from the prior year.

Q. With that in mind, that that booking may have been from the prior year, do you now recall that you did not have for your theatres a contract for the Warner product for 1936-1937?

A. In any of the theatres that I have?

Q. Yes.

A. I wouldn't know.

Q. Do you remember that about that time there was a year when Warner was out of your theatres, as the expression is used in the trade?

A. Would I remember——

Q. Do you remember?

[fol. 1916] A. No, I don't.

Q. You don't remember?

A. No.

Q. And you are unable to recall that your theatres had a single picture contracted for of the 1936-1937 season at the time of this conversation with Mr. Kalmenson, which you have placed as around about the end of 1936, or early 1937?

A. I don't remember.

Q. In saying that you went there to arrange for booking the pictures, you meant arranging dates for your theatres in which certain pictures already under contract were to be played in those theatres?

A. That is what I was there for.

Q. And your business there was with the booking department in that?

A. Yes, that is right.

Q. You had never met Mr. Kalmenson before, had you?

A. I had not.

Q. And did you ever meet him again until you met him in the Warner office in New York when he emphatically denied that he had made a promise of the product to you? Did you ever see him between those dates?

A. I suppose I saw him and said hello to him, but I never discussed anything with him.

[fol. 1917] Q. Anything that could be called a negotiation conversation, there was none between those dates? That is correct, isn't it, between something like——

A. I talked with Mr. Mooney about it.

Q. I am asking you about Mr. Kalmenson.

A. No, I hadn't discussed it with Mr. Kalmenson.

Q. You didn't go there that day for the purpose of buying pictures, did you?

A. Oh, I can't recall exactly, because I know that Mr. Mooney called me in his office and I asked for Mr. Mooney and he came out.

Q. All I have asked you is what you went there for was this booking job?

A. Talking about a contract. I don't know what all I had to do with him.

Q. You went there to get these pictures that were already booked under contract?

A. Maybe negotiating new contracts. I don't know.

Q. You have no recollection that that was your object, have you?

A. I haven't any recollection what specific reason I was there for.

Mr. McClennen: Now, if your Honor please, in any examination I make as to this conversation, which your Honor has admitted over our objection, in cross-examining [fol. 1918] on it I do not waive the objection.

The Court: I assume that to be so.

Q. The first time, then, that the matter of this commitment was again up between you and Mr. Kalmenson in conversation he emphatically denied that he had made any such commitment? That is true, isn't it?

A. You are referring to the New York——

Q. The New York, yes.

A. That is correct.

Q. Do you remember whether your attention was called at the time of that to the fact that you did not have a contract for any of your features for that year for that product?

A. I don't remember that.

Q. Was your attention called to the fact of the improbability that you would be promised, for an unbuilt theatre, product which you hadn't even contracted for for any of your theatres, was anything of that kind called to your attention?

A. It was not.

Q. Now, so far as your dealings with Mr. Schine were concerned, or with any Schine representative, no threats were made to you in any way, were they?

Mr. Wright: If the Court please,——

[fol. 1919] A. I don't get the question.

Mr. Wright: That calls for a conclusion. Let him state whatever conversations he had with them.

Mr. McClennen: I am cross-examining.

Mr. Wright: I suppose that is one of the things your Honor is going to decide, whether this whole course of dealing there amounted to a threat or whether it did not amount to a threat. I do not suppose the witness is the party to say whether he was threatened or not.

The Court: Put your question in another way.

Mr. Wright: He certainly can testify as to what was said to him by representatives of the Schine organization.

By Mr. McClennen:

Q. Mr. Connor told you in substance that it was a shame to have this situation going on in Medina and that you and Schine ought to get together?

A. That is correct.

Q. And that was the initial step in the negotiation that finally led up to the agreement that was made?

A. That is correct.

Q. And you were on friendly terms with Mr. Connor?

A. That is right.

[fol. 1920] Q. And you took it for granted that he was seeking to act as a personal friend of both parties?

A. That is correct.

Q. You told him, in substance, that you would like to deal with the subject if he could arrange an interview with Mr. Schine?

A. He suggested that we get together and he would do his best to get us together.

Q. And it was left that you would be glad to have him get in touch with Mr. Schine to bring about such a result?

A. That is right; such a meeting, I should say.

[fol. 1921] Q. Now, in the subsequent meetings did Mr. Schine threaten to do anything if you didn't come to terms with him?

Mr. Wright: If the Court please, the same objection applies. Let him say what Mr. Schine said or whatever the conversation was.

The Court: The question should be what was said. Was there anything said about forcing you out of business, or something like that?

By Mr. McClennen:

Q. Was there anything of that kind said?

A. No.

Q. You knew when the Princess operations were suspended, after the making of the agreement, Exhibit 648 of February 28th, 1939?

A. No, I do not know when they were suspended.

Q. I mean, when they were being suspended, didn't you know?

A. No, I did not.

Q. You thought that it was a desirable thing to have that town served by one adequate theatre, did you not?

A. I never discussed the policy of the operation in Medina from the day that they took over.

Q. Well, from long before that it was your opinion that one adequate theatre was the best service for that town, was it not?

A. I didn't know that.

[fol. 1922] Q. Did you think it?

A. Because I have theatres in other towns where we operate as small.

Q. Did you think it?

A. No, I wasn't sure because we have theatres in other towns; we have two theatres and operate the one theatre on the week-end and keep it closed up the other days, so I don't know what that town needed. We would have found out if we had tried to operate it.

Q. In the operation of the one theatre, the town has been well served, in your judgment?

A. Very well.

Q. The worthwhile pictures of all the distributors from time to time have been exhibited there?

A. As far as to my knowledge.

Q. The theatre operating conditions in that town are far better than they were before the spring of 1939, are they not?

Mr. Wright: If the Court please, I think he ought to say what he means by "better", better for whom?

The Court: In what respect?

Mr. McClennen: I mean in all respects.

Mr. Wright: If all of this is designed to prove you can make more money under this kind of an arrangement than [fol. 1923] you can under competition, that is stipulated. We don't need any testimony on that.

The Court: Your question is very broad; I mean, in what respect? The Court ought to know in what particulars.

Q. Better for the town, isn't it, the operation that has been conducted since the spring of 1939, than the operations before?

Mr. Wright: If the Court please, that isn't the question on which this witness is competent.

The Court: Sustained. The objection is sustained.

Q. Has there been, as far as you know, any overcharging of admissions in that town since the spring of 1939?

Mr. Wright: If the Court please, that is also objected to. He doesn't know even what the admission prices were.

Mr. McClennen: I did not hear, your Honor.

The Court: I will let him state.

Mr. Wright: He has already testified he did not know what the admission prices were.

The Court: Do you know what the admission prices are?

The Witness: No, I don't know. We get the weekly report in, but I didn't see the admission prices, and don't know what the admission prices are.

[fol. 1924] Q. There hasn't been brought to your attention any overcharging of admissions, has there been?

Mr. Wright: If the Court please, what he thinks is overcharging hasn't any relevancy in this suit.

The Court: Sustained.

Mr. McClennen: Then I understand the Plaintiff's position to be that overcharging in admission prices has no relevancy to this suit.

Mr. Wright: We don't know what overcharging is. I assume that when a man controls a town he charges the admission prices that will allow him the highest profits.

The Court: I suppose the admission prices depend on the product, what the pictures are, what company produces them, and so on. If he is in a position to say or knows what the products were and knows from experience elsewhere what is a reasonable charge.

Mr. McClennen: All I ask him is whether there had come to his knowledge anything of that kind.

Mr. Wright: What is the kind of thing that is to come to his knowledge?

The Court: Objection sustained.

By Mr. McClennen:

[fol. 1925] Q. The admission prices which may be charged in a theatre are materially affected by the cost of the product as bought from the distributing companies, are they not?

A. No, I wouldn't say that that would be the basis of the admission prices.

Q. It is not necessary in your experience to charge admission prices sufficiently to pay the cost of the product, is that the fact?

A. The cost of the product isn't the only thing.

Q. I am not asking about other things.

The Court: I will let him answer that, whether the cost affects, is relevant, or is taken into consideration in connection with the charge made.

Mr. Wright: It obviously is. We don't need testimony on that.

The Court: That is true.

Mr. McClennen: If it is obvious, that is as good as the witness' answer.

The Court: It is part of the cost of the company or the exhibitor which he would take into consideration in determining the price of admission.

Mr. McClennen: Of course, I cannot know what concessions the plaintiff will make until the questions are put [fol. 1926] that elicit them.

Q. In the negotiations for the agreement, Exhibit 648 for identification, were you advised of the fact that the other party to the agreement, that is, the Yudelowitch-Schine group, had expended in the spring of 1937 some $15,000 upon the improvement of the Princess Theatre?

A. I knew there was some improvement that was made, or being made, from my conversation. I met Yudelowitch some time or other, I don't know when, whether after we were in partnership together, and he said we had wasted a certain amount of money, whether it was $15,000 or not, I don't know, but it was my observation and my thought that he had advanced the money.

Q. And in the vicinity of $15,000?

A. Around that, I would imagine.

Q. And in the coming together of the agreement of February 28th——

Mr. Wright: If this is designed to prove what Yudelowitch advanced, we object to it. It is obviously hearsay, what he told this witness as to what was put into the theatre.

The Court: The question is the adequacy of the consideration.

Mr. Wright: It certainly isn't competent proof as to what Yudelowitch put into the theatre, the statement as to what [fol. 1927] he told this witness that he put into it doesn't prove what was put in. If that is the purpose of the

examination, it is objected to. The way to show that, I suppose, is by first-hand evidence of what, if anything, Yudelowitch put into the theatre, and what, if anything, Schine put into the theatre during that period. It can't be proved by this witness or statements made to this witness.

The Court: He can state, I think, what Yudelowitch put into the theatre was taken into consideration in making this agreement.

Mr. Wright: As to his knowledge; if his knowledge is material that is one thing, it is competent for that purpose, but knowledge of what Yudelowitch told him about what he put into the theatre or Yudelowitch put into the theatre, doesn't prove what was put in.

By Mr. McClennen:

Q. And in that conversation and in the negotiations none of that sum was to be paid either by you or by the joint enterprise back to Yudelowitch, that is true, isn't it?

A. The contract——

[fol. 1928] The Court: The contract shows it itself.

Mr. McClennen: It does if there was no separate agreement, and I am merely clearing that there was no agreement of that kind.

Mr. Wright: Yudelowitch is not a defendant here. I don't see what relevancy it has.

The Court: I will let him answer about a subsequent agreement on the $15,000.

By Mr. McClennen:

Q. There was no agreement or undertaking by you that you or the combined enterprise was to pay back to Yudelowitch the amount spent in the improvement?

A. I don't know the amount that was spent, who spent it, or how much, I don't know.

Q. You don't know, so you do know there was no agreement?

A. That is correct.

Q. There was no agreement apart from what is in the contract?

A. That is correct.

Q. That is all I asked you. Were you in Medina enough to know the sort of things that were done to the Princess Theatre in the way of improvement in the spring of 1937?

A. I didn't pay any attention to it.

Q. You have no knowledge whatever about that?

A. I saw them fixing up the front. What they did to the [fol. 1929] interior I didn't know.

Q. So that you are not in a position to tell us what sort of a theatre that was after those improvements were made? That is, you simply haven't seen it since the improvements were made except as you have seen the front?

The Court: The interior.

Q. The interior?

A. No matter what amount is spent——

Q. I am not asking you any matter.

A. I have seen it from the outside and it was just a 300-seat theatre.

Q. You have not seen the inside?

A. I have not seen the inside.

Q. And you do not know in any way the extent of the improvements that were made inside?

A. That is right.

Mr. McClennen: That is all the cross-examination.

The Court: Is there any redirect examination?

Mr. Wright: Yes, I have some redirect examination. I think I can conclude it in perhaps ten minutes.

[fol. 1930] Redirect examination.

By Mr. Wright:

Q. You were asked on cross-examination, Mr. Essick, the question of whether or not you had ever negotiated for Paramount, Fox, R.K.O. and Metro in Medina, and I think you answered "No". Did you understand that question when you answered it?

A. Well, everything outside of Metro. I didn't hear him say Metro, but I did talk with Metro in the fall of 1936.

Q. Well, you had——

A. I never talked with the other companies.

Q. Then your answer that you never negotiated for the other product was limited to Paramount, R.K.O. and Fox?

A. That is correct.

Q. And the negotiations with Metro that you testified to on the direct examination were those that were held before

or after you went to Gloversville in June or July of 1937?

A. After I went to Gloversville.

Q. And did Mr. Schine or Yudelowitch ever actually start construction on a theatre at Medina?

A. Not as I know of.

Q. There was no signs of any building?

A. No, sir.

[fol. 1931] Q. What, if anything, did Mr. Schine say to you when you went to Gloversville in July of 1937 as to whether or not they were going to put a third theatre in the town?

A. Well, I think while we were there, during the course of our conversation, I think he had a sketch of a theatre and he said "This is the theatre we are going to build in Medina." I think Mr. Fine said "You wouldn't be so foolish."

Mr. Wright: I want to offer in evidence this agreement for the 1938-39 season for Vitagraph product that has been previously identified in this folder, Exhibit No. 635-C, and I will ask to have that marked as 635-C (2), and offer it in evidence.

The Court: You are marking that 635-C (2)?

Mr. Wright: Yes.

(Thereupon agreement for the 1938-39 season for Vitagraph product referred to was marked as Plaintiff's Exhibit No. 635-C (2) in evidence.)

Q. You recognize that as a contract you made with Vitagraph for the 1938-39 season in Medina; it is your signature at the bottom?

A. That is right.

Mr. Wright: I have offered it in evidence.

[fol. 1932] Mr. McClennen: It is subject to the general objection.

Recross-examination.

By Mr. McClennen:

Q. You did not ask for Loew's product until after you learned that Mr. Schine had entered the picture, did you?

A. I didn't ask for the Metro product even after he entered.

Q. You didn't ask for it before, did you?

A. Before?

Q. Yes.
A. Before he entered the picture?
Q. Before Schine entered the picture?
A. No, we did not.

The Court: That is all, is it?
Mr. Wright: That is all.
The Court: We will suspend until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 1933] After Recess, 2 P. M.
Appearances: Same as before noted:

Myer S. Fine a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Fine?
A. Cleveland, Ohio.
Q. What is your occupation?
A. Motion picture business.
Q. What part of the motion picture business?
A. The exhibiting end of it.
Q. Operating theatres?
A. Operating theatres.
Q. How many theatres are you interested in?
A. About 25.
Q. You are the Mr. Fine that Mr. Essick referred to in his testimony?
A. Yes, sir.
Q. How many theatres were you interested in at the time you and Mr. Essick decided to build a theatre in Medina?
A. About the same number.
Q. What, if anything, did you have to do with the negotia-
[fol. 1934] tions for United Artists product for the Medina Theatre at Medina?
A. Mr. Stern and Mr. Goodman——
Q. Which Mr. Stern are you talking about?
A. Mr. Bert Stern, who was the district manager for United Artists.

Q. And Mr. Goodman, who was he?
A. He was the branch manager.
Q. At Cleveland?
A. At Cleveland, Ohio.
Q. When was it that you saw them about product for the Medina Theatre?
A. I couldn't say just when. It was some time during the process of our building the theatre.
Q. Do you think it was after you began construction?
A. I really couldn't say that.
Q. Was it about that time?
A. About that time; either before or right after. I don't know the exact time.
Q. What was this conversation? Was anybody else present besides you and Mr. Goodman and Mr. Bert Stern?
A. No.
Q. What was the conversation?

Mr. McClennen: If your Honor please, our general objection.

The Court: Yes.

[fol. 1935] A. I asked for the product for Medina. I told him we were either going to build or are building a theatre there, and they told me that the product was open for Medina and the product is mine—that is, ours, I should say.
Q. There was nothing said at that time about terms?
A. No.
Q. Then when did you get down to discussing the terms of a contract with them?
A. That was late—some time late in the summer of the year before we opened up, prior to opening up.
Q. That was the summer of 1937; is that it?
A. Yes, that would be the summer of 1937.
Q. At that time when did you expect to open?
A. We thought we would open around October, at that time.
Q. This was at the same place?
A. At my office.
Q. Who was present then?
A. Mr. Goodman and Mr. Stern.
Q. Anybody else?
A. No.
Q. What was said then?

Mr. McClennen: The same objection.

A. We consummated the deal at the time.

Q. You agreed on the terms, did you?

[fol. 1936] A. Yes, sir.

Q. Did you sign an application?

A. No, we did not.

Q. What form did the agreement take?

A. We just outlined the pictures that they thought they were going to have and we have agreed on the prices.

Q. That was pictures for what season?

A. For 1937-1938.

Q. What was the next time that you had a discussion with them about the contract for that season?

A. That was a little later. I don't remember just what time it was.

Q. Where was that?

A. In my office also.

Q. What was said then? Were the same people present?

A. That is right.

Mr. McClennen: The same objection.

Q. What was said then?

A. I can't remember just what was said, but I know we made a deal at the time.

Q. I understood you to say that you had made a deal at this conversation you just described.

A. I thought that is what you were asking me. Pardon me. No, after that we didn't have no meetings.

Q. After this conversation in which you said you made [fol. 1937] the deal, you said you didn't see them again?

A. Yes, I saw Mr. Goodman after that.

Q. When was that?

A. I really can't say what time it was, but it was after the time we made the deal.

Q. Some time in the fall of 1937?

A. I would imagine so.

Q. Was it before or after you opened the theatre?

A. No, quite awhile before we opened.

Q. Was anybody else present then?

A. Not to my recollection.

Q. This was in your office or Goodman's?

A. My office.

Q. What was said then?

Mr. McClennen: The same objection.

The Court: Same ruling.

A. I don't quite get the question.

Q. What was said then? What was the conversation between you and Mr. Goodman?

A. We talked in a general way and he wanted to know what time the theatre would be opened and how soon we could figure on it, and so forth.

Q. And you told him?

A. We told him we thought it would be open approximately November or December.

[fol. 1938] Q. Then you didn't open, though, until 1938; is that right?

A. That is right.

Q. Then did you have a further conversation at about the time you opened?

A. I really couldn't say just what conversation we had after that. I know I seen the man quite often.

Q. Did you sign an application at any time?

A. Yes, I did.

Q. For the 1937-1938 pictures. When was that?

A. Well, it was prior to opening. I really don't know when it could have been.

Q. Do you know how long before opening it was?

A. That would be a guess if I do say it. It must have been three or four months before.

Q. That was in the fall of 1937?

A. Right.

Q. When you signed the application was that for all the pictures or half?

A. For all of them.

Q. Then do you know what happened to the application?

A. No, I don't.

Q. You left it with Mr. Goodman?

A. That is right.

Q. Then did you hear any further word from him with respect to the application?

[fol. 1939] A. No, I didn't get anything from him.

Q. Did you hear anything from anybody with United Artists about it? Did you hear anything from any representative of United Artists about your application?

A. No, not until I received a telegram.

Q. When was that?

A. That was some time later. I don't remember just the exact time.

Q. Was this before the theatre opened?

A. Yes, sir.

Q. Have you searched for that telegram?

A. Yes, I turned it over to Mr. Essick and he said he searched for it everywhere and couldn't find it.

Q. You haven't been able to find it?

A. No, sir.

Q. Can you recall what the contents of the telegram were?

Mr. McClennen: The same objection.

The Court: Overruled.

A. If I remember correctly, the telegram approved the pictures in all of our theatres that I made a deal for; including a split for Medina, just half of the product for Medina.

Q. This application that you had signed, that you were referring to, was for a large number of theatres besides the one in Medina?

[fol. 1940] A. Yes, sir.

Q. But it included Medina; is that right?

A. That is right.

Q. And the application was for all the product in Medina?

A. Yes, sir.

[fol. 1941] Q. Now, what was the substance of the telegram?

A. The telegram was just mentioning that we have a split in Medina.

Q. And to approve the contract for the rest of the towns in full?

A. Yes, sir.

Q. Then do you remember who signed the telegram?

A. I really don't.

Q. What did you do then?

The Court: What difference does it make?

Mr. Wright: I don't think it makes any difference.

The Court: All right.

Q. What did you do then?

Mr. McClennen: That I object to.

Q. With reference to the United Artist product.

The Court: I will let him state what was done.

The Witness: Mr. Essick and I went to New York and saw Andy Smith.

Q. That is A. W. Smith, Jr.?

A. A. W. Smith, Jr., at United Artists.

Q. In New York City?

A. In New York City.

Q. Who else was present?

A. I don't recall who was present at the time, there was some other man come in and out of town, but I didn't even [fol. 1942] know who he was, some one from the United Artists.

Q. What was said then?

A. I told him we had bought the product 100 per cent for Medina, and I can't understand why——

Mr. McClennen: This is subject to the same objection.

The Court: Yes.

The Witness (Continuing): I can't understand why we got only half of it. He told us somebody in the office sold a split of the product to Mr. Schine and all they could give us would be just a half.

Q. Was that all he said?

A. That is all he said. He would try and see if he could get the rest of it for us, but we shouldn't depend on it too much.

Q. Then did you hear from him again?

A. I was in New York again a little later by myself and called him on the phone. He said he could not do anything for me, that is all we could get; if we didn't want that, they can't give us the rest of it, the other half.

Q. What, if any, efforts did you make to get all the United Artists product for Medina after that, after the season opened?

A. I didn't do much of the buying for Medina after that. [fol. 1943] Mr. Essick did that.

Q. For the year 1938-39?

A. For the year 1938-39.

Q. Do you recall whether you made any effort to get all of United Artists product for 1938-39?

A. I really don't remember whether I was in the picture or not.

Q. Did you have anything to do with negotiations for the Warner product prior to the time you went down to New York with Mr. Essick in the fall of 1937?

A. Yes, Mr. Kalmenson and Mr. Mooney were in my office.

Q. At what time?

A. I don't remember the time, quite some time before we opened the theatre.

Q. This was before you opened the theatre?

A. Yes, sir.

Q. Was there anybody else present then?

A. I don't remember whether any one else was present or not.

Q. What was said then?

Mr. McClennen: The same objection.

The Court: Overruled. Go ahead.

The Witness: We told them we were either building or going to build a theatre in Medina, and we knew that the product was not sold in the town.

[fol. 1944] Q. When you say "we," was there somebody else besides you there?

A. I mean by "we," we were building the theatre and we wanted to know how we stand on the product. He repeated to me he had made a promise to Mr. Essick and he said "That goes double. The product is yours for Medina whenever you open up."

Q. Did you see or have any negotiations or conversations about Medina with Mr. Kalmenson from that time until the time you went down to New York with Mr. Essick?

A. No, I did not.

Mr. Wright: You may cross-examine.

Cross-examination.

By Mr. McClennen:

Q. What was the approximate date of this conversation at your office with Mr. Mooney and Mr. Kalmenson?

A. I could not say what date it was.

Q. It was during the progress of the building of the theatre?

A. I could not even say that, it was either before or maybe after.

Q. You have no impression one way or the other about it?
A. What?
Q. You have no impression one way or the other about it?
A. No, I have not.

[fol. 1945] Mr. Wright: Is that all?
Mr. McClennen: That is all.
Mr. Wright: I would like to recall Mr. Essick for a few questions about United Artists.

PERCE E. ESSICK recalled by and on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Mr. Essick, did you handle the negotiations for your theatre in Medina for the 1938-39 United Artists product?
A. I did.
Q. Who did you——
A. I beg your pardon, what did you say, what company?
Q. United Artists.
A. I am pretty sure that I did.
Q. Do you remember whom you talked to at the United Artists about that season's product?
A. Mr. Goodman.
Q. That was where?
A. In my office in the Film Building.
Q. When was that, do you recall?
[fol. 1946] A. Oh, I can't recall about when it would be, some time in—maybe in the summer or maybe in the fall or some time prior to the releases for the 1938-39 season.
Q. That would be the summer and fall of 1938?
A. Yes, sir.
Q. And what, if anything, was said at your conversation with him with respect to getting all of the pictures for 1938-39?

Mr. McClennan: Same objection.
The Court: Overruled.
The Witness: I naturally asked him for all the pictures. He said that he could not sell them, I would have to be satisfied with half of them.

Q. Did he tell you why?

Mr. McClennen: Same objection.

The Court: Same ruling.

The Witness: I don't remember that.

Q. Was there any discussion as to terms on the pictures except the half?

A. That is right, the half is all we were going to have. The conversation was for the half.

Mr. Wright: That is all.

The Court: Did he say who had the other half?

The Witness: He said the Schines had the other half. He could not only talk with me on the half.

[fol. 1947] Mr. McClennen: I think I will ask him.

Cross-examination.

By Mr. McClennen:

Q. The United Artists sell their pictures singly, do they not make separate contracts for each picture?

A. They commence, sometimes with a group of pictures of four or five, but there are different producers.

Q. They have different producers in their company, and if there is any negotiations for contracts on they take a separate application for each picture?

A. Take a separate application on each picture.

Redirect examination.

By Mr. Wright:

Q. A separate application, you mean for each picture, or a separate application for the pictures of each producer?

A. Could I give an answer that would cover it?

Q. Yes.

A. Edward Small would be a producer for United Artists. He would maybe release three pictures, and I would do business with Edward Small. They would have Selznick, or whoever they would have, would make two or three pictures, and that is when the contract would come up, and that would be the——

[fol. 1948] Q. As I understand it, the applications are taken by producer rather than picture, is that right?

A. That is right.

By the Court:

Q. Then the application would be, in the case of an application for products by Selznick, an application for Selznick?

A. That is right.

Q. The group?

A. If he released two in that year or one.

Q. You would make an application for the product of somebody else separately, is that the point?

A. Yes, sir, whatever producers there was would be separate.

CHARLES E. DICKINSON, JR., a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Dickinson?

A. Shepardstown, West Virginia.

Q. What is your occupation?

A. I am Sales Manager for the Boiler Equipment Trust [fol. 1949] of North Amstertown, Massachusetts.

Q. How long have you held that position?

A. Seven years.

Q. Prior to that, what did you do?

A. Between 1936, when I left Lockport, New York and made the connection I now have I was not employed.

Mr. McClennen: What?

The Witness: Not employed.

Q. What was the period that you were in Lockport?

A. Well, I was born and raised there originally. Have you reference to some particular time? I didn't live there all my life.

Q. When were you connected with the Palace Theatre there?

A. From approximately July, 1932 to the spring of 1936.

Q. Was that a theatre in which your father had an interest?

A. That is correct.

Q. And when you came there, do you recall who the tenant of the theatre was?

A. The Schine organization.

Q. And what, if anything, did you do with reference to the theatre when you first come there?

A. I came to Lockport to assist father in his various businesses. The first thing I did was to take over for him the matter of collecting overdue rents from the Schine organization on that theatre.

[fol. 1950] Q. You mean, was the rent in default at the time you got there?

A. That is right.

Mr. McClennen: That is objected to.

Mr. Wright: I thought he said something about overdue rents.

Mr. McClennen: Yes, but he didn't say it was in default and he could not say it if he tried to, properly.

The Court: Do I understand the rent was in default?

The Witness: It was, yes, sir.

By Mr. Wright:

Q. Then what did you do with reference to the rent?

A. I co-operated with the attorney in various lawsuits that took place from that time on until the final eviction by due process of law in December of that year, evicting the Schine organization from that theatre.

Q. In December, 1932?

A. That is correct.

Q. Then——

Mr. McClennen: I think I should have amplified the objection.

The Court: Well——

Mr. McClennen: By pointing out to the Court that defaulting in the payment of rent is not a violation of the [fol. 1951] Sherman Anti-Trust Act.

The Court: I think it is immaterial. I think it can be stricken out. I think the answer is immaterial.

Q. In any event, Schine ceased to be the tenant in December of 1932?

A. That is correct.

Q. Then was a corporation organized to operate the theatre?

A. It was.
Q. What was the name of that corporation?
A. Reliance Theatres, Inc.
Q. What position did you hold in the corporation?
A. I was Vice President and Managing Director.
Q. Who was the President?
A. Nicodus Dipson.
Q. Then how long did he continue as President?
A. From then until about April of 1933.
Q. Then who became President?
A. Peter Grafiadas.
Q. Was he related to Mr. Dipson?
A. I always understood he was his nephew.
Q. When did the operation of the theatre under the Reliance Theatre Corporation commence?
A. We started the first day of January, 1933.
[fol. 1952] Q. Can you describe that theatre generally and the other theatres in Lockport at that time?
A. Our theatre, which was the largest and newest, was a house of approximately 1800 seats. The Rialto Theatre, which had been converted from a skating rink to a theatre, had approximately 1500 seats.
Q. Was that operated by Schine?
A. Yes, sir.

The Court: What was the name of that theatre?
The Witness: Rialto. The third theatre, which was not operating, but under lease to the Schine organization, is the High Art, which was an old theatre, I believe, made from an old business block. That had, I believe, about 1100 seats.

Q. Was that operating then?
A. It was not.
Q. Do you know how long it had been closed?
A. Approximately seven years.
Q. What major film product did you have for the Palace Theatre when you opened it?
A. We had one major product, the Metro-Goldwyn-Mayer.
Q. You were playing that first-run?
A. That is right.
Q. When did you contract for that?
[fol. 1953] A. I can't give you the exact month. It was prior to the opening.
Q. That was the pictures for the 1932-1933 season?

A. That is right, that had not been purchased by any one else.

Q. Then what, if anything else, did you have to do with efforts that were made to get other pictures for the theatre?

A. In conjunction with other members of our company I took part in personal calls on the managers of the various exchanges in Buffalo, helping in the composition of letters which we wrote to those same exchanges, requesting pictures or permission to buy pictures.

Mr. McClennen: What the letters said should be stricken out.

The Court: Yes, the letters are the best evidence.

Q. You received, did you not, replies from various of the companies that you contacted?

A. I did.

Mr. Wright: I will ask to have these five letters here marked with the next five plaintiff's numbers for identification.

(The letter, May 5, 1933, referred to was marked as Plaintiff's Exhibit 649 for identification.)

(The letter, May 8, 1933, referred to was marked as Plaintiff's Exhibit 650 for identification.)

[fol. 1954] (The letter, May 16, 1933, referred to was marked as Plaintiff's Exhibit 651 for identification.)

(The letter, June 1, 1933, referred to was marked as Plaintiff's Exhibit 652 for identification.)

(The letter, July 28, 1933, referred to was marked as Plaintiff's Exhibit 653 for identification.)

Q. I will hand you these letters marked for identification as 649 to 653, inclusive, and ask you to look at those and say whether you recognize them as letters received by the Reliance Theatre Corporation, on or about the dates that they bear?

A. I do.

Mr. Wright: I will offer these five letters in evidence.

Q. One more preliminary question. By the way, do you recognize those as all the replies you received or are those simply all you were able to locate?

A. They are not all that we received but they are all that I have been able to locate.

Q. For that year, 1933?

A. That is right.

Mr. McClennen: The general objection, if your Honor please, to communications between these companies not shown to be co-conspirators and this witness.

[fol. 1955] The Court: I understand your objection does not go to the proof of the signatures?

Mr. McClennen: No.

The Court: Objection overruled.

(The letters referred to, previously marked as Exhibits 649 to 653, inclusive, for identification were received in evidence and read by Mr. Wright as follows):

[fol. 1956] Exhibit 649:

"Metro-Goldwyn-Mayer Pictures
Metro-Goldwyn-Mayer Distributing Corporation
509 Pearl Street
Buffalo, N. Y.

May 5, 1933.

Mr. P. Grafiades, Palace Theatre, Lockport, N. Y.

Dear Mr. Grafiades:

In acknowledgment of your letter received, requesting information as to our 1933-34 product, please be advised that our new season's policy on product has not been set up as yet for the forthcoming season, and we are not now in a position to make any definite commitment regarding the new year's pictures.

However, we appreciate your inquiry and will certainly keep your situation in mind, as you request.

Kindest regards,

Sincerely, E. K. O'Shea, Resident Manager.

EKO's:MF"

[fol. 1957] EXHIBIT 650

"Universal Film Exchanges Inc.
505 Pearl Street
Buffalo, N. Y.

May Eighth 1-9-3-3.

Mr. Peter Gradiades, President, Reliance Theatres, Inc.,
Palace Theatre, Lockport, N. Y.

DEAR SIR:

This will acknowledge your letter of April 29th.

In view of the fact that we already have, in existence, a long-term franchise with the Schine Theatres in Lockport, we are unable to comply with your request to commit ourselves to play any of our pictures in your theatre.

We shall be glad to negotiate with you, as we have in the past, on any of the pictures that Schine eliminates in this situation.

Very truly yours, Universal Film Exchanges, Inc.,
Dave Miller, Resident Manager."

DM-RA.

[fol. 1958] EXHIBIT 651

"Paramount Pictures Distributing Corporation
Distributor of
Paramount Pictures
464 Franklin St. Buffalo, N. Y.

May 16, 1933.

Mr. Peter Grafiades, Palace Theatre, Lockport, N. Y.

DEAR MR. GRAFIADES:

We have your recent letter regarding our next season's product for Lockport, N. Y.

It is too early as yet to make plans for next season. We will, however, keep your request at hand until such time as we are ready to sell our new season's product. We will at that time give it consideration.

Very truly yours, K. G. Robinson, Branch Manager."

KGR:EB

[fol. 1959] EXHIBIT 652

"Paramount Pictures Distributing Corporation
Distributors of
Paramount Pictures
Times Square New York
Chickering 4-7040 * Cable address FAMFILM
Office of J. J. Unger

June 1st, 1933.

Mr. Peter Grafiades, President, Reliance Theatres, Inc.,
Palace Theatre, Lockport, N. Y.

DEAR SIR:

Your letter of May 26th to the Motion Picture Producers and Distributors has been referred to us for attention.

We regret very much that it will be impossible for us to offer you our product for the coming season, because of our partnership with Mr. Schine in the Rialto Theatre.

Naturally, we have to reserve our pictures for our own theatre.

Very truly yours, J. J. Unger."

JJU:NRC

[fol. 1960] EXHIBIT 653

"Metro-Goldwyn-Mayer Pictures
Loew Building—1540 Broadway
New York

Office of W. F. Rodgers

July 28, 1933.

Mr. Peter Grafiades, Palace Theatre, Lockport, New York

MY DEAR MR. GRAFIADES:

The delay in acknowledging your letter to me of the 18th has been occasioned by my frequent absences from the city.

In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport, as well as other situations, and as we are hardly in a position to forego or jeopardize the business from their other situations, and for the further reason that they have for a number of years been a very representative account, we feel that our interests would be best served by giving them such consideration.

Under the circumstances, we are not in a position to offer you our 1933-34 product.

The assurance you speak of as made to you by Messrs. Dipson and Osborne was certainly not with our sanction, as no arrangements were made with them for the delivery of product to the Palace Theatre, Lockport, beyond those pictures covered in the existing agreements and representing those subjects under contract to the above theatre for what is known as our 1932-33 product.

We appreciate your letter of inquiry and also the consideration you have seen fit to give us in the past and feel sure that after due deliberation you will fully understand our position in the matter.

With kindest regards, Sincerely, W. E. Rodgers."

WFR:MTL

[fol. 1961] Q. Who were the Messrs. Dipson and Osborn referred to in that letter I just read?

A. Nikitas Dipson was the President of the Reliance Corporation when it was formed back in December, 1932. John Osborn was an associate of his and I believe a Director in the corporation at that time.

Q. By the corporation you mean Reliance Theatres?

A. Reliance Theatres, yes.

Q. After this letter of Mr. Rodgers, Exhibit 653, was received, did you go to see Mr. Rodgers?

A. I went to New York and made a call on him personally.

Q. Do you recall when that was?

A. Some time during the summer of that year. I don't know the exact date or even the exact month, but it was during the summer.

Q. Where did you see him?

A. In his office.

Q. Do you remember who else was present?

A. There was no one present at that time.

Q. Other than yourself and Mr. Rodgers?

A. That is right.

Q. What was the conversation you had with him then?

Mr. McClennen: The same objection.

The Court: Overruled.

A. My purpose in seeing Mr. Rodgers was——

[fol. 1962] The Court: What was said, he asked you

A. I told Mr. Rodgers that we had played his pictures since the opening of the theatre under the contract we had for his product; that we had done very well with them, from the angle of the theatre being of the type and the pictures being of the type that we liked to show; that we had given them long runs, single feature, and that I was hopeful that he would be able to change the reply of his letter and give us consideration, on the basis that we had been his customer and a satisfactory one, for the coming season's product.

Q. What did he say?

A. He told me that he would like to have his pictures played in the Palace Theatre, that Metro-Goldwyn-Mayer always liked to have their pictures played in the best house in any town, the most outstanding house, but that a contract with the Palace Theatre for the 1933-1934 season, in contrast with a contract for the Schine Chain, would amount to peanuts, and he was sorry but he could not do anything for us.

Q. Then did you call on any other film distributors in New York at that time?

A. I don't believe I did. I don't recall on that trip, no.

Q. Had you been able at that time to contract for any first-run major films for the 1933-1934 season?

[fol. 1963] A. Not at that time, we had not.

Q. When you got back did you receive any communication from any one connected with the Schine organization?

A. I received no written communications.

Q. Did anybody come to see you?

A. I had a meeting with Mr. May.

Q. When was that?

A. In Mr. Geer's office. Mr. Geer was manager of the Rialto at that time. My best recollection in placing a date would be—I can't swear to this—probably September of that year.

Q. September of 1933?

A. Yes, sir.

Q. What was the conversation you had with Mr. May?

A. Mr. May made me an offer, or asked me to take his offer to my father, who was critically ill at that time, of purchasing the lease of the Reliance Theatre at a figure, I believe, of around $15,000 plus percentage per year.

Q. You say purchasing the lease. Were they to pay you anything in addition to the rent or were they just making an offer for the theatre on the basis of—what was it you said—$16,000 a year?

A. I believe that is the figure, roughly.

Mr. McClennen: That is objected to, if your Honor please, [fol. 1964] as leading.

The Court: Yes, let him state what the talk was.

Q. Can you tell us exactly what the offer was?

A. As I recall, it was an offer made to take over the lease that Reliance Theatres had with the landlord company that owned the theatre.

Q. The landlord company was what?

A. Lock City Theatres, Inc.

Q. That is the company in which you and your father were also interested?

A. Yes, sir.

Q. And to pay what sum as rent?

A. My best recollection is $16,000, plus a percentage of the net for a year.

Q. What was the amount of the rental before the Schine Company was evicted from the premises?

Mr. McClennen: That is objected to.

The Court: What materiality has that, Mr. Wright?

Mr. Wright: The materiality is that after they had demonstrated that they could keep pictures away from this theatre they tried to come in and lease it for about half of what had been formerly paid.

Mr. McClennen: That is not the occasion for getting into the record what your Honor had indicated was immaterial, [fol. 1965] this matter of any eviction. If what is wanted is what was the rental price under the earlier lease we had better have the lease as the means of telling that.

Mr. Wright: If he knows I think he can state what the rental is.

The Court: The lease is the best evidence, no doubt.

Mr. Wright: I did not ask him for the terms. I merely asked him the amount of the yearly payment.

The Court: You are asking what the lease said. That is the effect of it.

Mr. Wright: We can, of course, prove that by the lease. I do not understand that there is any dispute as to what the amount of the rental is that the former lease called for.

The Court: Counsel has objected to it.

Mr. McClennen: If he will just let us see the lease we can tell whether there is any dispute or not. We don't know. [fol. 1966] Mr. Wright: You certainly have a copy of it.

Q. Do you have a copy of the release with you, Mr. Dickinson?

A. I don't have it with me, no.

Mr. Wright: Would you produce your copy?

Mr. McKay: It hasn't been subpoenaed.

Mr. Wright: Do you want a subpoena to produce it?

Mr. McKay: We have it somewhere, but we haven't been called upon to produce it.

Mr. Wright: Well, do you want a subpoena?

Mr. McKay: We don't want a subpoena and, if we have it, we will produce it.

By Mr. Wright:

Q. What was the rest of this conversation?

A. Well, I would say that was the sum of it because I wasn't interested, and that ended it.

Q. You rejected the offer?

A. Yes, sir.

Q. And then——

A. There was,—it comes to mind, there was another subject that was mentioned at the time.

Q. What was that?

A. That was concerning the fact that the High Art Theatre, which had been closed for all the preceding seven years, would be re-opened by the Schine organization to use up the large volume of product they had bought, that it [fol. 1967] would be necessary.

The Court: May told you that?

The Witness: Yes, Mr. May said it would be necessary to do that in order to play the large quantity of pictures that had been purchased.

Q. Was that all the conversation?

A. Yes, sir.

Q. And then did any one else approach you with an offer after that?

A. There was a man by the name of Kronick, I don't know how you spell, it sounds like K-r-o-n-i-c-k, who stated he represented the Paramount Theatre people.

Mr. McClennen: Just one moment. He hasn't been asked to state the conversation.

Q. Can you give us the conversation you had with Mr. Kronick?

Mr. McClennen: That is objected to.

The Court: Who is he?

Mr. Wright: A representative of Paramount-Publix.

Mr. McClennen: There is no representative by that name of Paramount that has appeared here.

Mr. Wright: Paramount-Publix, I said.

Mr. McClennen: And it should not be stated that he was a representative on the present state of the record.

[fol. 1968] The Court: Do you know who the gentleman was?

By Mr. Wright:

Q. Do you know Mr. Kronick was?

A. Only that he told me he represented the Paramount Pictures Corporation.

Mr. McClennen: May that be stricken out?

The Court: I will let it stand, only that he told me, and strike out the Paramount Pictures Corporation.

Mr. McClennen: I would urge that it is not admissible.

The Court: Strike out the latter part, who he represented I will strike out.

Q. What was the conversation you had with him?

Mr. McClennen: That is objected to.

The Court: Well, unless he is a representative of one of these alleged conspirators, it is incompetent.

Mr. McClennen: We urge, at least on the present state of the record, and I believe in fact, that he was not the representative of any even alleged co-conspirator.

The Court: Sustained at this time.

Q. Did you receive any further visits from anyone from the Schine organization?

A. Yes, about the early part, no, about—a little after the [fol. 1969] middle of the month of October, and I place that date in mind with reference to the opening date of the High Art Theatre, just two or three days prior to that date, which was October 21st, 1933, I met a Mr. Carroll, who said he——

Mr. McLennen: Just a moment.

The Witness: —(continuing) was connected with the Schine organization as a representative.

Mr. McClennen: Just a moment, Mr. Witness, did you observe that I was addressing to the Court an objection?

The Witness: I am very sorry.

The Court: You met a Mr. Carroll. The rest may go out.

The Witness: I met a Mr. Carroll.

Q. And what was the conversation you had with him?

Mr. McClennen: That is objected to.

The Court: Are we informed who this man was, who Mr. Carroll represents?

Mr. Wright: I don't think Mr. Carroll's name is mentioned in the interrogatories. I understand he was, however, at this time District Manager of the Schine Theatre.

Mr. McClennen: I regret that counsel states his understanding into the record. There is no such record and we [fol. 1970] do not have any knowledge of any such relationship.

The Court: Objection sustained.

Q. Had you ever seen this Mr. Carroll before, that talked to you?

A. Yes, sir.

Q. Where had you seen him?

A. Rialto Theatre.

Q. What was he doing there?

A. At the time I saw him he was talking to me.

Q. I say before this last conversation that I asked you about?

A. I had met this Mr. Carroll in town on various occasions.

Q. Well, who had introduced you to him?

A. That I can't say, I don't remember the individual, but it was in one of Mr. Schine's theatres where I first met him.

Mr. McClennen: May that last be stricken out.

The Court: I will let it stand, that it was in one of Mr. Schine's theatres.

Q. Was he introduced to you by another employee of Schine?

Mr. McClennen: I object to that.

The Court: Sustained.

Q. Do you remember who introduced him to you?

The Court: "Yes" or "No".

[fol. 1971] The Witness: No.

Q. Do you remember anything about the circumstances of the introduction other than it occurred in one of the Schine Theatres?

A. No, that was prior to his meeting with me in October, 1933.

Q. Yes, I think you misunderstood the question. Repeat the question.

(Question read.)

A. There was nothing that would tie previous meetings into mind with Carroll now.

Q. Then did the High Art Theatre re-open?

A. It did.

Q. And it stayed open, did it?

A. It stayed open as long as I had any connection with the Reliance Theatres.

Q. Can you recall what sort of policy the High Art and Rialto were operating under?

Mr. Rogers: May we not get some dates?

The Court: What do you mean by policy, price or product?

Mr. Wright: Both.

The Court: When did it open?

The Witness: October 21st, 1933.

The Court: He has asked you with reference to the [fol. 1972] policy with reference to charges or product.

The Witness: The announced policy in the paper, which was followed on the opening, was that first and second-run pictures would be shown with several changes a week.

By Mr. Wright:

Q. Then what policy were you operating the Palace on at the same time?

A. We opened and continued for many months on a single feature basis with probably—I couldn't say as to that, because our policy changed about every two or three weeks.

Q. After the High Art opened, what, if any, major product did you have at the Palace first or second-run?

A. We had the balance of Metro-Goldwyn-Mayer from the 1932-33 season that we had stretched out, but not played yet.

Q. Anything else?

A. Not at the time the High Art opened, except independent pictures, which we occasionally get, not any of the major ones.

Q. Then in the spring of 1934, what, if any, efforts did you make to secure a major film product for the theatre?

A. We again wrote letters to distributors of all of the eight major distributors in Buffalo, making a similar request for permission.

Mr. McClennen: Just a moment, you can't answer that. [fol. 1973] The Court: Sustained.

Mr. Wright: The answer that they wrote letters, I take it is admitted.

The Court: I will receive that they wrote letters to the different producing companies in Buffalo. The balance is stricken out.

Q. And did any of the major companies solicit an application from you for first or second-run of their pictures for the 1934-35 season?

A. They did not.

Q. Then in the summer of 1934, did you again go to New York?

A. I did.

Q. And who did you see then?

A. I called Mr. Rogers' office again.

Q. Mr. Rogers at——

A. Metro-Goldwyn-Mayer. I first called and he was not there. I talked with his assistant whose name I don't remember. The assistant told me——

Mr. McLennen: Just a moment.

Mr. Wright: If the Court please, if this is someone that he was referred to in Mr. Rogers' office, I think it is competent to state what he was told.

The Court: If we can assume authority from the mere fact he was in the office, without showing what his position [fol. 1974] was.

Mr. Wright: He at least had authority prima facie to talk to people who came to see Mr. Rogers. He was referred to him.

The Court: How do you know?

Mr. Wright: His statement is to the effect he went in to see Mr. Rogers and he was told to see this gentleman, that Mr. Rogers was out.

Mr. McLennen: It hasn't been even stated that much.

Mr. Wright: He has been permitted yet to state what did happen.

Mr. McClennen: Of course, because you have put an objectionable question and the Court has ruled it out.

By Mr. Wright:

Q. Did you go into Mr. Rogers' office when you went there?

A. I went to the office and asked for Mr. Rogers and was told that he was not in, but that I could see his assistant.

Q. Who told you that, do you know?

A. The Information girl.

Q. The Information girl at the Loew's office?

A. Yes, sir.

Q. And then did she or anybody else take you to this person that she described as his assistant?

[fol. 1975] A. She did.

Q. And then did you have a conversation with that person?

A. I did. He advised me that——

Mr. McClennen: Just a moment.

Mr. Wright: Just a minute. Would you state what the conversation was?

Mr. McClennen: We object to that.

By the Court:

Q. Had you ever seen this man before or since?

A. No, sir.

Q. You don't know his name?

A. No, sir, I don't remember because I called again the next day and saw Mr. Rogers himself.

The Court: Objection sustained.

By Mr. Wright:

Q. You say you saw Mr. Rogers himself the next day?

A. That is right.

Q. What was the conversation you had then?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: I inquired from Mr. Rogers whether we were going to be given an opportunity of buying his 1934-35 season's pictures.

The Court: That is Metro?

The Witness: Metro. He advised that they were nego-
[fol. 1976] tiating with the Schine organization at that time and until they definitely knew the result of that negotiation, they could not talk to us.

Q. Did you hear anything further from him?

A. No, sir.

The Court: Did you say when that was?

The Witness: That was in the summer of 1934.

Q. Then did you see any other distributor representatives on that trip?

A. I saw Mr. McEvoy, of R.K.O. organization.

Q. Whereabouts?

A. In his office.

Q. Who else was present?

A. No one.

Q. What was that conversation?

Mr. McClennen: Same objection.

The Court: Is that the same time, same trip?

The Witness: It was on the same trip to New York, yes.

The Court: Objection overruled. McEvoy?

Mr. Wright: Yes, McEvoy, M-c E-v-o-y.

The Court: All right.

Q. You may state the conversation.

A. The conversation as I recall it would be similar; I can't remember the exact words.

[fol. 1977] Mr. McClennen: May that be stricken out.

The Court: "Similar" is stricken out.

Q. Give us the substance.

A. I asked Mr. McEvoy if we would get a chance to purchase their product for that season, and he gave me no assurance that we would, that they were negotiating with the Schine organization and had little hopes to hold out to me that they would do anything.

Q. Is that all?

A. That was the end of that conversation, and I didn't hear anything more from them.

Q. Did you see any one else?

A. I met a Mr. Unger.

Q. Where?

A. In his office, and he was connected with Paramount Pictures. I don't know the correct title for Paramount, so when I say "Paramount" that is the best I can do.

Q. Who else was present then?

A. No one.

Q. Was there anybody else present, do you recall?

A. No, sir.

Q. What was the conversation you had with Mr. Unger?

Mr. McClennen: Same objection.

The Court: I don't know. Is there anything in the record to show who Mr. Unger was?

[fol. 1978] Mr. McClennen: Yes, your Honor, Mr. Unger has been shown to be, I think, Eastern Sales Manager.

The Court: For Paramount?

Mr. McClennen: For Paramount.

The Court: Overruled.

The Witness: I asked Mr. Unger the same question, would we be able to buy or get a contract for his pictures for that season.

The Court: His answer?

The Witness: The answer was that they had nothing to offer us.

Q. I didn't hear that answer.

A. They had no pictures to offer us, or words to that effect. I can't quote the actual conversation. It took place ten years ago.

[fol. 1979] Q. Did you see any one else then about major product?

A. I saw a man by the name of Jackter of Columbia Pictures.

Q. Jackter?

A. Jackter is the way I recall it.

Mr. Wright: If your Honor please, we haven't had the Columbia representative here to testify, but I don't believe there is any doubt as to who this man was at that time.

Mr. McClennen: I do not find Mr. Jackter's name on my lists in any way.

The Witness: That is my best guess. I don't know how he spelt it.

Mr. Wright: If the Court please, we expect to connect this up.

The Court: All right, the Counsel states he will connect this individual up. I will receive it subject to its being stricken out if it is not connected up with the company.

Mr. McClennen: The best information we can get at the moment is that Mr. Jackter, if it is this one, was the assistant to the General Sales Manager of Columbia at some period. I don't know whether at this time or not. We cannot go beyond that at this time.

The Court: What talk did you have with him?

Mr. McClennen: The same objection.

[fol. 1980] A. I asked the gentlemen if we were going to be given permission to buy or get a contract for their product for this season, that is, the same season that we have been talking about, and he said that he was not in a position to do any negotiating at that time with us.

By Mr. Wright:

Q. Was there any further conversation?

A. No.

Q. Did you hear from him later?

A. No.

Q. Who else did you see about major product on this trip?

A. I saw Mr. Smith of Warner Bros. What his title was I don't know.

Q. What was the conversation you had with him?

Mr. McClennen: Was this Andy Smith?

Mr. Wright: Andy Smith is right.

Mr. McClennen: The same objection.

The Court: Overruled.

A. And asked him the same question, if we would be permitted to buy or could expect to get consideration for that season's product of Warner Bros. He advised me that they were negotiating with Schine at that time, that there might be a possibility of splitting the product, that we would hear about it later, and we heard nothing further. [fol. 1981] That was the end of the conversation.

Q. Was there any one else you saw about major product on that trip?

A. There was a man named Hill. I am trying to remember which company he was connected with.

The Court: Where did you see him? Do you know where it was?

The Witness: In the New York office, in his office.

The Court: What particular place was it?

The Witness: I wouldn't remember. I made all these calls in a short period of a few days, so that running back and forth I wouldn't remember. I can't remember at the moment. I contacted all of those eight distributors.

Q. If you name the eight distributors maybe that will help you remember it.

A. Metro-Goldwyn-Mayer, RKO, Columbia, Warner Bros., Paramount. That would leave Universal and——

The Court: Columbia?

The Witness: No, we covered Columbia with Mr. Jackter.

Mr. Wright: He named all but two, I believe.

The Witness: I named all but two, Universal, and I am trying to think of the other one. Perhaps if I took a piece of paper and pencil and wrote these things down that would help. (Writing on sheet of paper.) I have got the names [fol. 1982] of the two companies I called on that I haven't reported on before. Fox and Universal. I saw Mr. Hill, but I can't remember which company it was that——

Q. You don't remember whether he was with Fox or with Universal?

A. I would have to guess. I also saw a man in the same position at the Fox Company, but I can't place these men in their respective companies.

Q. When you went to the Fox Company who did you ask to see, do you recall that?

A. May I refresh my memory from my own personal notes that I have in my pocket on these calls?

Mr. Wright: Surely.

Mr. McClennen: These are notes that you made at the time in 1934, are they?

The Witness: No, these are my own personal notes that I have jotted down since I came to Buffalo.

Mr. McClennen: In 1944?

The Witness: Yes. Mr. Clarence Hill was in the Fox organization.

By Mr. Wright:

Q. What was the conversation you had with him?

Mr. McClellen: This I object to. There is nothing to indicate that at this time Mr. Hill was in any position of [fol. 1983] authority in Fox. In the ensuing winter, that is the winter of 1934 to date, it has appeared that Mr. C. A. Hill was assistant to the Eastern Division Sales Manager, but nothing as to what his position was in the summer of 1934.

Mr. Wright: I take it his position on this date, whatever it may have been, can subsequently be developed. That, it seems to me, would save time to hear the conversation at this time, subject to being stricken.

Mr. McClennen: I submit that that should not be done. This course was pursued so that we might know who was claimed to be what in what period. The periods were selected by the Government and we had the check to see whether there was any inaccuracy or not. In the case of Columbia unfortunately it has not been done yet. We have done the best we could under the circumstances. But here Fox has been covered and I submit they should not be taken at all.

Mr. Wright: If the Court please, I submit that the purpose of covering those names was, of course, to spe- [fol. 1984] cifically identify those who were mentioned in the memorandum. It may appear at any time that some witness had a conversation with somebody we didn't have on our list and we would certainly expect to be able to show who he was if, in fact, he was the representative of one of these companies. I do not see that there is any finality about what was done by way of identifying these officials.

Mr. McClennen: We are not suggesting that there was any finality. We are suggesting that we had urged the importance of having this information in definite form before the Court so that we could know about it in advance. This conversation was before the time that it appears that Mr. C. A. Hill became assistant to the Eastern Division Sales Manager. We submit that in the description of the duties that was given there was no authority in Mr. Hill, even at his highest position, to speak in this way.

The Court: What do you say your information is as to what position he did hold?

[fol. 1985] Mr. McClennen: The testimony of Mr. Jenkins was that from the winter of 1934 to the present time he was assistant to the Eastern Division Sales Manager, and that is all that we have except the inference that we may draw that prior to that time that he was in no greater position.

The Court: I think, as a matter of convenience, we ought to receive the testimony, but, as you pointed out, the authority to make such a commitment has got to be shown.

Mr. Wright: It may appear, if the witness is permitted to answer, that the statement is not one which requires any authority anyway.

The Court: You say a man by the name of Hill. What conversation did you have with him?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: I thought I had given that testimony, your Honor, but the conversation was that I asked whether or not we would have an opportunity of buying that season's products, and I believe Mr. Hill held out little opportunity for it. At least he gave me no definite assurance on that call [fol. 1986] that we could get consideration.

By Mr. Wright:

Q. Do you recall who you saw at Universal?

A. I didn't call at Universal.

The Court: You didn't call there?

The Witness: No, sir.

Q. And did you say you had called on anybody at United Artists?

A. I saw Mr. Gold at the United Artists.

Q. What was the conversation with him?

Mr. McClennen: The same objection.

The Court: Who is he?

Mr. Wright: Mr. Harry Gold I think was Eastern Sales Manager.

The Court: Objection overruled.

A. Mr. Gold advised me, when I asked him if we could negotiate for that season's pictures, that they were negotiating with the Schine organization and that they had not signed yet, but I would have to wait the decision of their negotiations with the Schine organization. That was the

end of the conversation with Mr. Gold and I never heard from him after that.

The Court: What was that?

The Witness: That was the end of my conversation with Mr. Gold and I heard nothing later from him.

Q. In these conversations that you have just referred to, [fol. 1987] what, if anything, was said with respect to a particular run, whether it was first or second run of the product?

A. At the time I was talking with these various gentlemen I was endeavoring to secure first-run for that season.

Q. There was no discussion of a second-run possibility?

A. Not with them.

Q. Then what, if any, major product did you have for the P-lace during the 1934-1935 season?

A. Will you clear up your question? You are referring now to the pictures we played in 1934 or the 1934-1935 contract?

Q. I mean current releases of the 1934-5 season, regardless of when you may have played them.

A. As I recall, we didn't have any during 1934.

Q. Any 1934-1935?

A. Until, I believe, in the winter of that year, or late fall or winter——

The Court: Which year, 1934 or 1935?

The Witness: 1934.

By Mr. Wright:

Q. It would be the winter of 1934-1935?

A. Yes, the winter of 1934-1935. We succeeded in getting a Columbia contract.

Q. For a first-run?

A. First-run. We started playing pictures under that [fol. 1988] contract, if I recall correctly, in the winter of 1934-5.

Q. And did you have any other 1934-1935 major product?

A. We had a small number of United Artists pictures, under first-run contract with them. That is the best of my recollection.

Q. Those were 1934-1935 releases?

A. Yes, sir.

Q. In the spring and summer of 1935 were you solicited by any of the major companies that you have mentioned for 1935-1936 contracts?

A. No, sir.

Q. How about specifically with reference to Columbia and United Artists?

A. We solicited Columbia. Columbia didn't solicit us.

Q. Who did you see?

A. Are you speaking of the year we got the contract or the following year?

Q. I am referring now to any efforts that you may have made to get pictures for the 1935-1936 season. As I understood your former testimony you had the 1934-1935 Columbia pictures, which you began to play in the winter of 1934-1935?

A. That is right. We had no 1935-1936 contract with any of the majors.

Q. What, if anything, did you do to secure a continuance [fol. 1989] of your Columbia run?

A. We again wrote all the Eight Majors, requesting permission——

Q. No. I asked you with specific reference to Columbia.

A. I don't recall any specific effort we put forth in Columbia's case, other than any of the others.

Q. But in any event you got none of the eight companies for the 1935-1936 season?

A. No.

Q. Does that statement apply to second as well as first-run?

Mr. McClennen: That is objected to.

The Court: He may state. Did you get any second-run for 1935-1936?

The Witness: We got some second-run pictures from RKO.

By Mr. Wright:

Q. Any of the others?

A. If you limit me to specific dates on there it is difficult for me to answer, but if you allow me to say this, and stop me if I go too far, during the period or periods——

Mr. Rogers: One moment. We do not want any volunteer testimony.

The Court: No. Just answer the question.

Q. Just state what, if any, product that you had second-run there at the Palace during any seasons?

Mr. McClennen: That is objected to as too general. We [fol. 1990] have got down to the season of 1935-1936 and I submit that the question should not be so general as that.

The Court: I assume you are inquiring as to 1935-6?

Mr. Wright: The last question I asked him was broader. I asked him what if any second-run product he got from the major companies during any of the three seasons that he was connected with the Palace Theatre operation.

The Court: 1932 to 1936?

Mr. Wright: Yes.

Mr. McClennen: That is objected to as too general. It is not often, as your Honor knows, that we know season-by-season.

The Court: I will let him state first what second-run pictures he had during that period from these companies, and it can later be shown what they were.

The Witness: We obtained some second-run pictures during that time.

[fol. 1991] Q. From what company?

A. I believe we got some from R.K.O., Columbia—I can't remember the exact exchanges, but we got some others.

Q. Well, did you have from any of them during that period a regular season's second-run——

A. No.

Q. Contract?

A. No.

Mr. McClennen: That is objected to, if your Honor please.

The Court: Just a moment. Do you mean for an entire season, do you mean?

Mr. Wright: Yes, a second-run contract for an entire season's releases, current releases from any of them.

The Court: I will let him answer; objection is overruled.

The Witness: No, sir.

Q. Then when was it that you terminated your connection with the Palace Theatre?

A. I believe it was April, 1936.

Q. That was when the theatre was sold?

A. That is when the estate of my father sold its interest in the theatre company.

Q. When did your father die?

A. December, 1933.

[fol. 1992] The Court: You say it was sold when?

The Witness: April, 1936, as near as I can remember the exact date.

Mr. Wright: You may cross-examine.

Mr. McClennen: If your Honor please, before cross-examination begins might we have a few minutes' recess?

The Court: Yes, surely.

(Short recess.)

Mr. Wright: If the Court please, I would like to interrupt a moment to have a witness, who has been sitting here from the Lockport paper, identify this book. Then we have agreed with counsel that either side may tomorrow, or whenever it is convenient, read into the record such excerpts as may be offered in evidence.

Mr. McClennen: Assuming, if the Court please, when they are referred to, they are admissible in character. As a matter of fact, I don't know as it is necessary to put this lady on the stand if this can be marked for identification.

Mr. Wright: She wants the book back, of course.

The Court: I thought you wanted to use it to look over [fol. 1993] tomorrow.

Mr. Wright: Yes, we do want to use it, but we don't want to put it into the record. All we want to put into the record is such parts as we may offer.

Mr. McClennen: Well, we stipulate that this volume is a volume of the Union Sun and Journal, publications, of Lockport, New York, from August 1, 1933, to November 29th, 1933. That may be marked.

Mr. Wright: I thought it was December.

Mr. McClennen: Well, it is understood that Mr. Wright assumes control of the book and that we may both look at it as we please.

The Court: All right.

(Volume of newspaper, referred to, was marked as Plaintiff's Exhibit No. 654 for identification.)

Cross-examination.

By Mr. Rogers:

Q. Now, Mr. Dickinson, do you recall when the Palace Theatre was built?

A. I wasn't there at the time it was built.

Q. You don't know?

A. I only know when it was opened.

[fol. 1994] Q. Do you know when it was opened?

A. 1925.

Q. And do you know when the Rialto Theatre was built, or weren't you in Lockport at that time?

A. No, I wasn't there at the time it was changed from the rink to the theatre.

Q. Don't you know it was entirely rebuilt and wasn't just changed from a rink to a theatre? Now, answer that question. Isn't that so?

A. I still say it was changed from a rink to a theatre.

Q. You do say that?

A. Yes, sir.

Q. You weren't there when it was built?

A. I was there various times after it was opened, but not the——

Q. You weren't there when it was built?

A. No.

Q. As a rink it had no projection booth?

A. No.

Q. And had no screen?

A. I don't see why it should.

Q. Tell me what was in it.

A. I couldn't. I wasn't there.

Q. Did you ever visit it?

A. Yes, I skated in it.

[fol. 1995] Q. And visited the theatre after it was built?

A. Yes, sir.

Q. Answer my question as to the physical properties that were in it; when it was a skating rink it had no projection booth or any projection equipment, did it?

Mr. Wright: For heaven's sake——

The Court: We can almost take judicial knowledge or notice that a skating rink wouldn't have it.

Mr. Rogers: Your Honor may take judicial notice of that, but——

The Court: That might be going too far.

Mr. Rogers: Well, skating rinks have had projection equipment in them and have had screens and they have given them a combination skating and motion picture program. It had no seats in it, did it?

The Witness: I would say I can't answer those questions, because a skating rink might have had a screen in it, I don't know.

Q. You don't know, then?

A. No.

Q. Now, prior to the date the Palace Theatre was opened, the Rialto had been operating, hadn't it?

A. I believe so.

Q. And the Rialto had been showing the pictures of all [fol. 1996] these eight major companies, hadn't it?

A. I don't know, I wasn't in town.

Q. Did you visit the town at any time prior to the time the Palace was finished and the Rialto Theatre was in operation?

A. I believe so.

Q. Did you go to the Rialto Theatre during those periods?

A. The best I can answer, the best answer I can give you to that is that I went to the Rialto Theatre after it was changed from a skating rink. I could not even give you the year I went to it, because during all that time I only visited Lockport then only a day or so at a time during all those years.

Q. Now, when you came to Lockport to take over the operation of the Palace Theatre, when was that?

A. I didn't come to Lockport to take over the operation of the Palace Theatre.

Q. You said you did operate the Palace Theatre from 1932 to 1936.

A. I believe I said I came to Lockport in about July, 1932 to go into business with my father. I knew of nothing connected with the theatre until I got there.

Q. You got to Lockport in 1932, did you?

A. That is correct.

Q. At that time you took over the operation of the Palace [fol. 1997] Theatre in conjunction with Mr. Dipson, didn't you?

A. In December.

Q. Whether it was December or any other time it was in 1932, wasn't it?

A. That is right.

Q. At that time was the Palace Theatre, in December, 1932, was it in operation, or was it closed?

A. I believe it was in operation for perhaps a few days in December.

Q. By whom was it operated that time?

A. The Schine people.

Q. Then they left the premises and the house was dark for how long?

A. I would say a couple of weeks.

Q. Now, when you opened the Palace Theatre, the Rialto Theatre was an operating theatre, wasn't it?

A. That is right.

Q. And it was showing the pictures of all major companies, wasn't it?

A. I don't know anything about that. I didn't pay any attention to what they were showing at the time we opened.

Q. You mean you didn't even inquire what product the Rialto Theatre was showing even though you were about to open the Palace and operate that theatre, and you needed [fol. 1998] product?

A. You asked what product they were showing.

Q. Yes.

A. You didn't ask me what product they had. I know what they were showing.

Q. I am asking you what product they were showing.

A. Major product, I don't know which one, during that small period of time in December.

Q. Don't you know during that period of time they were showing the eight major products?

A. They weren't showing Metro when we got the theatre in December.

Q. Other than Metro were they showing all the others?

A. I assume they had them. I don't know whether they were showing at that particular time—you are shortening it to a couple of weeks in December.

Q. When did you come to Lockport in 1932?

A. July or June.

Q. When you got there in June——

A. I never went to the theatre.

Q. You mean from June to December you didn't go to the Rialto Theatre?

A. No.

Q. And you didn't know what they were showing?

A. No.

[fol. 1999] Q. Haven't any idea what they were showing?

A. No.

Q. When you decided to form the Reliance Theatres, Inc., to take a lease on the Palace Theatre, you did invite Mr. Dipson to become your partner, didn't you?

A. Are you putting that on a personal basis?

Q. Well, I put it on——

A. As a connection of mine?

Q. I put it on any basis; did you invite him?

The Court: Did you invite him?

The Witness: The arrangement was made between my father and Mr. Dipson. I had no authority to invite anybody.

[fol. 2000] Q. Well, in other words, did your father form this Reliance Company or did you form it?

A. No, sir, my father and Mr. Dipson formed the Reliance Company.

Q. And Mr. Dipson at that time in 1932 was a big circuit operator of motion picture theatres, wasn't he?

A. I don't know.

Q. You know nothing about that either, do you?

A. No.

Q. You know nothing about his activities at that time?

A. No, sir.

Q. Or in 1933 or 1934?

A. When you say a big circuit operator I say no, sir. If you ask me whether he had any other theatre interests I say yes.

Q. Do you know what other theatre interests he had at that time?

A. Outside of perhaps a theatre in Medina and one in Batavia, something like that, I don't know any of the details of what Mr. Dipson owned or controlled or operated.

Q. You had dealings with Mr. Dipson from 1932 to 1936, didn't you?

A. Mr. Dipson was not President of Reliance Theatres after April of 1933.

[fol. 2001] Q. I am not asking you whether he was President. I merely asked you, didn't you have numerous dealings with Mr. Dipson from 1932 to 1936?

A. No, I didn't have any dealings with Mr. Dipson. I saw him quite often but I had no dealings with him.

Q. Didn't you have any dealings in connection with the Palace Theatre with him when you saw him during these periods?

A. Not after April, 1933. My dealings were entirely with his nephew from that time.

Q. When?

A. April, 1933.

Q. You say you had no dealings at all with Mr. Dipson after April of 1933?

A. If you could define the word "dealings" I could answer you.

Q. Used in its broad sense. You know what the word "dealings" means. You are American-speaking, English-speaking. Now, take it in its broad sense.

The Court: Doing business with him I suppose he means?

Mr. Rogers: Yes, certainly.

A. Only in an advisory sense.

Q. When you say in an advisory sense, just what do you mean by that?

A. In a broad sense, asking questions concerning the theatre business that I didn't know the answers to, and [fol. 2002] consulting with him as I might with any man who had experience in the theatre business which I might not of had yet.

Q. You went to him on frequent occasions for advice and guidance, didn't you?

A. Yes, sir.

Q. Prior to 1932 did you ever operate a motion picture theatre?

A. No, sir.

Q. Wasn't it for that reason that you called Dipson in to associate himself in the operation of that Palace Theatre?

A. I didn't call Dipson.

Q. Or that he was called in? Isn't that so?

A. I would assume so, yes.

Q. Wasn't it for that reason that Grafiades was called in?

A. That I can't answer.

Q. You mean you did not call Grafiades in?
A. No, sir.
Q. Your father called him in?
A. No, sir.
Q. Who called him in?
A. I assume Mr. Dipson.
Q. And Mr. Dipson put him in?
A. Yes, sir.
Q. What was Mr. Dipson's interest in the theatre?
A. An equal share with my father.
[fol. 2003] Q. That is, they each had 50% of the stock of the Reliance Company?
A. I assume so.
Q. What interest did Mr. Grafiades have?
A. I can't tell you that exactly. I was always under the assumption that he took over his uncle's interest.
Q. Was that as much as you knew about it?
A. The actual details, yes.
Q. You were Vice President of the Company?
A. That is correct.
Q. You didn't know who the stockholders of the company were?
A. Yes.
Q. You did know or you didn't know?
A. I did know.
Q. If you did know, will you tell me what interest Mr. Grafiades had in the company?
A. I just answered that by saying I believe it was Mr. Dipson's interests. What the details of his interest were, outside of the original arrangement, I don't know or don't remember.
Q. Isn't it a fact that Mr. Dipson had 50% of the company?
A. I believe so.
Q. Mr. Grafiades had 16⅔ interest of the company?
A. I wouldn't remember that.
Q. You wouldn't contradict that, would you?
[fol. 2004] A. No, I wouldn't remember.
Q. Before you opened the Palace Theatre the Schines were the regular customers before that of the various eight companies, weren't they?
A. I believe so.
Q. Do you recall who was the tenant of the Palace Theatre prior to the time Schine operated the theatre?

A. Operated that theatre?

Q. Yes, the Palace.

A. I believe it was the Paramount-Publix Corporation.

Q. Or one of its subsidiaries?

A. Yes, sir.

Q. Do you recall during that same period when the Palace was operated by this Paramount Company, or a subsidiary, who had the High Art Theatre?

A. No, I don't.

Q. Well, don't you know that Paramount also had the High Art Theatre?

A. I don't know that. I wasn't there at that time.

Q. Do you know who originally closed the High Art Theatre?

A. No, I don't know that.

Q. Didn't you know that Paramount originally closed the High Art?

A. No, I didn't know that.

Q. Don't you know that when Schine and the Paramount [fol. 2005] together took over the operation of the Palace Theatre that the High Art was closed and was kept closed?

A. All I know is that the High Art was closed for seven years prior to our opening the theatre. Who shut it, or why it was shut, I have no idea, nor was I interested.

Q. Prior to the time of your taking over the Palace Theatre the two theatres operating in that town, actually operating, I mean, were the Palace and the Rialto; is that correct?

A. Yes, sir.

Q. And they were operated as a Paramount-Schine operation; is that right?

A. I believe so.

Q. When you called on these various exchange managers or district managers that you testified to, and they told you that they were negotiating with Schine, you knew that they were negotiating with a company that was their present customer at that time, didn't you?

A. With the exception of Metro.

Q. Let us say with the exception of Metro. With reference to all the others you called on you knew that they were dealing with their present customer?

A. They told me so.

Q. They told you that, didn't they?

A. Yes, sir.

[fol. 2006] Q. They told you that Schine had been their customer for a number of years prior thereto in Lockport; is that right?

A. I don't know as they told me how many years.

Q. You knew that, didn't you?

A. I merely could assume it, because I wasn't there.

Q. Do I understand you to testify—if not please correct me—that you got none by way of first-run product for the 1935-1936 season; is that right? You so testified, didn't you?

A. I believe so.

Mr. Rogers: Mr. Wright, do you have the United Artists contracts?

Mr. Wright: I think they are being prepared for identification by Mr. McGrath. The ones that we have subpoenaed, do you mean?

Mr. Rogers: Yes.

Mr. Wright: Those, I think, have been collected in a drawer, which is downstairs.

Mr. Rogers: Could we have them, please?

Mr. Wright: Why, yes, certainly.

Mr. Rogers: While I am interrogating Mr. Dickinson?

Mr. Wright: They have not been identified, of course.

Mr. Schilz: I am not certain that Mr. McGrath has produced any United Artists contracts for Lockport.

[fol. 2007] The Court: Look it up and see.

By Mr. Rogers:

Q. Now I show you this paper, and at the foot of that paper there is "Reliance Theatres, Inc., by Peter Grafiades, President." Do you recognize that signature?

A. Yes, sir.

Q. That is Mr. Grafiades' signature?

A. Yes.

Q. And he was President at that time?

A. Yes.

Q. Do you remember anything about that contract, or did you not negotiate it?

Mr. Wright: Has it been marked?

Mr. Rogers: I just wanted to know whether he negotiated that.

Mr. Wright: I just wanted to be sure whether we knew what we were talking about.

The Court: Which one do you refer to?

Mr. Rogers: I just showed him this paper. I will identify it in a moment.

By Mr. Rogers:

Q. You say you did not negotiate that contract?

A. No.

Q. And that Mr. Grafiades negotiated that; is that right?

A. Apparently. What is the date of that contract?

Q. There are two dates. The application date is February [fol. 2008] 27, 1935. The contract date is March 1, 1935.

A. Is that the full contract for that season or just certain pictures?

Q. It says 1935-1936 season.

A. How many pictures does it cover?

Mr. Rogers: Now I wish to offer this contract in evidence.

Mr. Wright: You are referring to this one sheet. Is that what you had marked?

Mr. Rogers: I am referring to that one contract.

Mr. Wright: We have no objection.

The Witness: Your Honor, is it permissible for me——

The Court: No.

(The contract, Columbia Pictures, for 1935-1936 season, referred to was received in evidence and marked as Defendants' Exhibit D-47.)

Q. Now I also show you contract for special production, Abdul, The Damned, Palace Theatre, Lockport, application date, May 26, 1936, and approval date, June 4, 1936, and I ask you, does that likewise bear the signature of Mr. Grafiades?

Mr. Wright: If the Court please, this is after he left the company and after the period he covered in his testimony. I do not see that it is proper cross-examination.

Mr. Rogers: This is the 1935-1936 year. This is Mr. [fol. 2009] Grafiades' signature.

Mr. Wright: The date you read was after the date when Mr. Dickinson was associated with the Company. The only thing we examined him about was what happened during that period. He does not know what Mr. Grafiades may have done after that time.

By Mr. Rogers:

Q. Let us see——

The Court: He left in the spring of 1936?

Mr. Rogers: The spring of 1936.

Q. Weren't you still connected with the Company?

A. Not on the date you read.

Q. I read two dates.

A. Neither one.

Q. In May or June of 1936?

A. No, sir.

Q. You weren't connected with the Company?

A. No, sir.

Q. I show you a contract with Columbia Pictures for the season 1934-1935, dated February 27, 1935, application date, and approved date, March—it looks like March 15, 1935. I ask you if that is the signature of Mr. Grafiades?

A. That is right.

[fol. 2010] Q. And he was the President of Reliance at that time?

A. That is right.

Q. Do you know anything about that contract?

A. I testified that we had the contract at that time.

Q. I say, do you know anything about the contract?

A. Well, I knew about it.

Q. Did you negotiate it?

A. Well, only that I sat in on hearings on it.

Q. I say, did you negotiate it?

A. Did I sign it?

Q. No. Did you negotiate the terms of the contract or did Mr. Grafiades do that?

A. I was with him on several occasions when it was discussed but I would say that he did most of the negotiating.

Mr. Rogers: I offer that in evidence.

Mr. Wright: No objection.

(The contract, Columbia Pictures, 1934-1935 season, referred to was received in evidence and marked Defendants' Exhibit D-48.)

The Witness: When would that *that* date was, Mr. Rogers?

Mr. Rogers: It looks something like March 15, 1935, I said.

The Witness: Not 1934?

Mr. Rogers: 1935.

The Witness: That is when it was approved, 1935.

[fol. 2011] By Mr. Rogers:

Q. I show you contract with Columbia Productions, bearing date March 12, 1934, and approved March 14, 1934, and ask you did you have anything to do with the negotiating of that contract?

A. In the same capacity, yes.

Q. I mean you sat in on some of the conferences, but Mr. Grafiades really negotiated the contract?

A. And signed it. And it covers how many pictures?

Q. It speaks for itself. Do you remember that contract?

A. Nine pictures.

Q. That was first-run, wasn't it?

A. Yes, I assume so. I haven't checked it to find out.

Q. Well, check it.

A. That is right.

Q. First-run is right?

A. Yes, first-run.

Mr. Wright: Do the release dates of the pictures appear there? I just wanted to be sure that an attempt was not being made to represent this product as current product if it does not happen to be current product.

Mr. Rogers: I am not making any representations. I am just offering contracts in evidence with the product he got. Any objection?

[fol. 2012] Mr. Wright: None at all.

(The contract, Columbia Productions, dated March 12, 1934, referred to, was received in evidence and marked Defendants' Exhibit D-49.)

[fol. 2013] Mr. Rogers: Mr. Wright, were you able to get those Universal contracts for me?

Mr. Wright: What was that?

Mr. Rogers: Do you have the Universal contracts?

Mr. Wright: They are down in the office. We will bring up whatever we have got.

Mr. Rogers: And were those United Artists sent up, do you know, Mr. Wright?

Mr. Wright: Yes, they are all here.

Mr. Schilz: We called for second-run contracts only under our subpoena and that is all that were produced under paragraph 5 of the subpoena.

Mr. Rogers: You have no first runs?

Mr. Schilz: I have here all they produced under the subpoena.

Mr. Wright: That would include the first-run Schine contracts; they should be there.

By Mr. Rogers:

Q. Do you recall receiving the original of this paper I show you?

A. Who signed it?

Q. Who signed it?

A. Who signed it?

The Court: What is your answer?

[fol. 2014] Q. What is the answer?

A. You asked me if I received this?

Q. Yes, if you recall receiving it?

A. I believe I have.

Mr. Rogers: I offer it.

The Witness: What was the date of that letter again?

Mr. Rogers: January 16th, 1934.

Mr. Wright: May I ask the purpose of the offer?

Mr. Rogers: Why, certainly, the purpose of the offer is to show that there was an offer made to them of product, contrary to the testimony of this witness. They are offering a first, second and third-run product there.

Mr. Wright: This letter doesn't show anything of the sort. It merely contains an assertion. I have no objection to it being shown to the witness to refresh his recollection, but it isn't evidence of what happened.

The Court: It is evidence of notice of any letter on the offer of first, second and third-run.

Mr. Wright: This is a recital of what he says they have done. This isn't an offer as I read it, at all.

Mr. Rogers: It is definitely an offer.

The Court: "I have something to offer you on first-run."

[fol. 2015] Mr. Rogers: Exactly. He asked him to step in and make a deal.

Mr. Wright: I beg your pardon.

Mr. Rogers: I grant your pardon, Mr. Wright. That one will be Exhibit 50. Now, it is a letter bearing date January 16th, 1934, addressed to Pete Grafiadas, signed United Artists by J. H. K., Sales Manager.

(Letter bearing date of January 16th, 1934, addressed to Pete Grafiadas, signed United Artists by J. H. K., Sales Manager, referred to was marked as Defendants' Exhibit No. 50 in evidence.)

By Mr. Rogers:

Q. I show you this telegram and ask you do you recall having seen that and receiving it?

A. I believe so, because I recall playing the last one of the pictures referred to in this copy of telegram.

Mr. Rogers: I offer it in evidence.

Mr. Wright: No objection.

(Thereupon telegram referred to was marked as Defendants' Exhibit 51 in evidence.)

Mr. Rogers: This is a telegram bearing date January 30th, 1934 from Al. Lichtman, United Artists Corporation, [fol. 2016] to Reliance Theatres, reading as follows: "Your application for following contract is hereby approved. 'Bitter Sweet', 'Tonight or Never', 'Scar Face', 'Cock-O-Air'."

Q. I show you this copy of a wire and ask you if you recall having received that?

A. I can assume so, because we played the picture "Arrow Smith."

Q. And that was played first-run, wasn't it?

A. I wouldn't state right now.

Mr. Rogers: I offer it.

Mr. Wright: No objection.

(Thereupon wire referred to was marked as Defendants' Exhibit No. 52 in evidence.)

By Mr. Rogers:

Q. Now, Defendants' Exhibit 52 is a telegram bearing date January 31, 1934, Al. Lichtman, United Artists Corporation to Reliance Theatres, Inc., "Your application for contracts 'Arrow Smith' and 'Unholy Garden' is hereby

approved." Mr. Dickinson, with reference to Defendants' Exhibit 51, covering approval of "Bitter Sweet", "Tonight or Never", "Scar Face" and "Cock-O-Air", those pictures were played by you first-run, weren't they?

[fol. 2017] A. I remember the first, "Bitter Sweet." I don't remember whether we played it first-run or not. The others I am not familiar with.

Q. I show you a copy of a telegram and ask you if you recall having received that?

A. Same answer.

Q. You do?

A. Yes, sir.

Mr. Rogers: I offer it.

Mr. Wright: No objection.

(Thereupon telegram referred to was marked as Defendants' Exhibit No. 53 in evidence.)

Mr. Rogers: Defendants' Exhibit 53 is a telegram bearing date February 26th, 1934, from Al. Lichtman, United Artists Corporation, to Reliance Theatres, Inc., "Your application for contracts 'Emperor Jones' 'Henry the VIII,' and 'Secrets' is hereby accepted."

Q. I show you this telegram and ask you if you recall having received that?

A. Same answer.

Mr. Rogers: I offer it.

Mr. Wright: No objection.

[fol. 2018] (Thereupon telegram referred to was marked as Defendants' Exhibit No. 54 in evidence.)

Mr. Rogers: Defendants' Exhibit 54 is a telegram dated May 10th, 1934, from Al. Lichtman, United Artists Corporation, to Reliance Theatres, Inc., "Your application for contract 'Catherine the Great' is hereby approved."

Q. I show you this telegram and I ask you do you recall having received that?

A. Yes, but I am not certain that we played that.

Mr. Rogers: I offer it.

Mr. Wright: No objection.

(Thereupon telegram referred to was marked as Defendants' Exhibit No. 55.)

The Court: Can we save time by combining our inquiries instead of going over several documents, so we can get them in the record?

Mr. Rogers: I have no objection to doing it that way if we can do it that way.

Mr. Wright: If the Court please, if the purpose of this is to show what pictures the Palace played, we have in answer to interrogatories prepared by United Artists, which we intended to have Mr. McGrath identify, which [fol. 2019] shows exactly what pictures were played at the Palace, High Art and Rialto during the seasons in question and when and what rentals were. I submit that document will do this all at once.

Mr. Rogers: Not having had access to those documents and not being able to bring this witness back here, I am afraid I will have to take advantage of what I have at the moment.

Mr. Wright: I give you my assurance we will ask Mr. McGrath to identify the document I have just described.

The Court: That is Mr. McGrath representing United Artists?

Mr. Wright: Yes, he hasn't identified the United Artists exhibits.

The Court: My thought was he has identified several of those, and the others can be identified.

Mr. Wright: I think we will ask Mr. Rose to identify similar exhibits for Columbia, and also Mr. Murray to identify a similar compilation for Universal, although Universal will not go back beyond 1934-35 season.

Mr. Rogers: Will the others go back?

Mr. Wright: They may not, but I will check.

[fols. 2020-2022] Mr. Rogers: That is what I feared. There is a cut-off and I may not be able to get over on their document.

Mr. Wright: Why don't you proceed?

Mr. Rogers: Exhibit 55 is a telegram dated June 12th, 1934, from Al. Lichtman, United Artists Corporation to Reliance Theatres, Inc., "Your application for contract 'Sorrow and Son' is hereby approved."

Mr. Wright: Columbia begins with the——

The Court: We will save time if you get together on it.

Mr. Rogers: If your Honor took a recess until 10 o'clock tomorrow morning, that would afford us an opportunity to get together and save a lot of your Honor's time.

The Court: Very well, we will suspend now.

(Whereupon a recess was taken until Thursday, October 5th, 1944, at 10 o'clock, a. m.)

[fol. 2023] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA,

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 5th, 1944, at 10 o'clock a. m.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homan, Esq., and Howard M. Antevil, Esq., appearing for Defendants.

[fol. 2024] PROCEEDINGS

Mr. Wright: I assume you are going to put those back in the folders in the order in which they were, when you get through?

Mr. Rogers: We are going to offer them in evidence.

Mr. Wright: They were handed to you in folders, marked by seasons, and for convenience we would like to have them kept that way.

CHARLES E. DICKINSON, JR., resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Cross-examination (continued).

By Mr. Rogers:

Q. I show you a copy of a letter bearing date June 14, 1934, from Bykowski, United Artists Corporation, addressed to Pete Grafiades. Do you recall having received that letter?

The Court: I think we have spent a needless amount of time in inquiries as to those letters. Unless there is some special reason for it, as I said last night, I think you should [fol. 2025] go over these exhibits, have the witness identify them, and offer them, unless there is some supplementary inquiry to be made.

Mr. Rogers: These letters do not come within what Mr. Wright suggested yesterday. All Mr. Wright suggested was a stipulation on the actual play-offs of pictures.

Mr. Wright: If the Court please, I said——

The Court: I was not speaking about a stipulation. I was speaking about the question of the saving of time, that is all.

Mr. Rogers: This shows a continuous course of conduct.

The Court: The witness had better go through them and select those of which he has knowledge.

Q. I want you to take these letters, and will you look at these letters and telegrams, and tell us whether you recall having received them?

A. This top one I already testified to yesterday that the telegram——

The Court: Look through them and select those of which you have knowledge.

Mr. Rogers: Is it your Honor's idea that I should offer these as one lump exhibit then?

The Court: I do not care. I did not want you to examine [fol. 2026] him specially as to each one. If there is a group of them that he can identify you can handle it that way and save time.

Q. What about this one (showing copy of letter to witness)?

A. I don't recall seeing that. There seems to be a repetition in some of these.

The Court: Lay those aside as to which there is any question and you can take those up later.

Q. With reference to the following, letter June 14, 1934, from Bykowski, United Artists, addressed to Pete Grafiades, you do recall that, and the telegram dated June 23, 1934, from Al Lickman, United Artists, to Reliance, and letter November 7, 1934, United Artists Corporation, Secretary to Mr. Kaplan, to Mr. Peter Grafiades, and letter January 18, 1935, Bykowski, United Artists, to Peter Grafiades; letter September 21, 1935, United Artists Sales Manager to C. E. Dickinson, and letter November 13, 1935, A. W. Kelly, Vice President, United Artists Corporation, to Reliance Theatres; those I recited are letters and a telegram which you recall having received?

A. I believe so, yes, sir.

Mr. Rogers: Will you mark those in the order in which I called them?

[fol. 2027] (Letter, June 14, 1934, referred to was marked Defendants' Exhibit D-56 in evidence.)

(Telegram, June 23, 1934, referred to was received in evidence and marked Defendants' Exhibit D-57.)

(Letter, November 7, 1934, referred to was received in evidence and marked Defendants' Exhibit D-58.)

(Letter January 18, 1935, referred to was received in evidence and marked Defendants' Exhibit D-59.)

(Letter September 21, 1935, referred to was received in evidence and marked Defendants' Exhibit D-60.)

(Letter November 13, 1935, referred to was received in evidence and marked Defendants' Exhibit D-61.)

[fol. 2028] Mr. Wright: We do not have any objection to these on the ground of relevancy or materiality, except for the fact a number of them apparently just duplicate material which will otherwise go in the record in the form of contracts. A number of them are simply letters confirming contracts. It seems to me it is cluttering up the record to put in both the confirmation and contracts.

The Court: Overruled. Received.

Mr. Rogers: Letter of June 14th, 1934, your Honor, is Defendants' Exhibit 56; telegram of June 23rd, 1934, is

Defendants' Exhibit 57; letter of November 7th, 1934 is Defendants' Exhibit 58; letter of January 18th, 1935 is Defendants' Exhibit No. 59; letter of September 21st, 1935 is Defendants' 60 and letter of November 13th, 1935 is Defendants' Exhibit 61.

Q. Now, with reference to the letters I hold in my hand in a group, and which you have handed to me, it is my understanding that you do not have any recollection of having received these letters, is that right?

A. My memory isn't clear enough to give you a definite answer that I did receive them.

[fol. 2029] Q. In other words, you are uncertain as to whether you did or did not?

A. Because the only thing I can judge from is the name of the picture mentioned in it and that I don't recall.

Mr. Rogers: I shall mark these for identification, may it please the Court, and one is a letter of May 17th, 1935 from A. Lichtman to Reliance Theatres, Inc.

(Thereupon letter of May 17th, 1935, from A. Lichtman to Reliance Theatres, Inc., referred to was marked as Defendants' Nos. D-62 for identification.)

Mr. Rogers: Letter from J. A. Bykowski to Palace Theatre, dated May 28th, 1935 is Defendants' Exhibit 63 for identification.

(Thereupon letter from J. A. Bykowski to Palace Theatre, dated May 28th, 1935, referred to was marked as Defendants' Exhibit D-63 for identification.)

Mr. Rogers: Letter, Bykowski to Grafiades, May 2nd, 1935 is Defendants' Exhibit 64 for identification.

(Thereupon letter from Bykowski to Grafiades, May 2nd, 1935, referred to, was marked as Defendants' Exhibit D-64 for identification.)

Mr. Rogers: Letter, Sales Manager, United Artists to [fol. 2030] Reliance Theatres, Inc., dated November 19th, 1934, is Defendants' Exhibit 65 for identification.

(Thereupon letter, Sales Manager, United Artists to Reliance Theatres, Inc., dated November 19, 1934, referred to was marked as Defendants' Exhibit D-65 for identification.)

Mr. Rogers: Letter dated July 25th, 1936, G. J. Shafer, to Grafiades is Defendants' Exhibit 66 for identification.

(Thereupon letter dated July 25th, 1936, G. J. Shafer to Grafiades, referred to, was marked as Defendants' Exhibit D-66 for identification.)

Mr. Rogers: Letter, September 28th, 1936, Bykowski to Grafiades——

The Witness: Just a moment, September, 1936, I wasn't there.

Q. That is right.
A. That is correct.
Q. I am correct about that, am I not?
A. Yes, sir.

The Court: That appears to be after the time the witness was connected with it.

Mr. Rogers: Exactly.

[fol. 2031] (Thereupon letter dated September 28th, 1936, Bykowski to Grafiades, referred to was marked as Defendants' Exhibit No. D-67 for identification.)

Mr. Rogers: Letter October 6th, 1936, Bykowski to Grafiades.

(Thereupon letter dated October 6th, 1936, Bykowski to Grafiades, referred to was marked as Defendants' Exhibit No. D-68 for identification.)

Q. I ask you to kindly look through this group of United Artists contracts and ask you to recognize those as contracts made for product to be played at the Palace Theatre, Lockport.

The Court: Made by Reliance?

Mr. Rogers: Made by Reliance.

The Witness: You will have to interpret, the carbon is poor on this first one.

The Court: Look at the signatures.

Q. Surely.
A. Is that all you want?
Q. Yes.

The Court: They may be signed by somebody else, and if so state if they are.

Q. Keep them in that order because Mr. Wright wants them kept in that order.

Mr. Wright: We are satisfied those contracts came from [fol. 2032] the files of the United Artists. I should think that is all that is necessary.

Mr. Rogers: And also that they are contracts for service to Reliance Theatres, Inc., for the Palace Theatre.

Mr. Wright: Yes.

Mr. Rogers: That is sufficient.

Mr. Wright: That is, I assume you have the group we handed you.

Mr. Rogers: This is the group we took from your files, Mr. Wright, yes.

Mr. Wright: Yes.

Mr. Rogers: Now, I ask that these be marked D-69 in evidence.

The Court: Do these purport to be with different companies?

Mr. Rogers: No, this is United Artists. I want to group them by companies to save time. This is a contract with United Artists for the picture "Arrow Smith."

The Court: Exhibit 69 in evidence?

Mr. Rogers: Dated January 27th, 1934.

(Thereupon contract with United Artists, dated January 27th, 1934, for picture "Arrow Smith," referred to was marked as Defendants' Exhibit D-69 in evidence.)

[fol. 2033] Mr. Rogers: That is Defendants' Exhibit 69 I just read from, first-run. D-70, also first-run, dated January 27th, 1934, picture "Scar Face."

(Thereupon contract dated January 27th, 1934, first-run, picture "Scar Face," referred to, was marked as Defendants' Exhibit D-70 in evidence.)

Mr. Rogers: Contract dated January 27th, 1934, first-run, "Tonight or Never." That is Defendants' Exhibit No. 71 in evidence.

(Thereupon contract dated January 27th, 1934, first run, "Tonight or Never," referred to, was marked as Defendants' Exhibit D-71 in evidence.)

Mr. Wright: I don't see any run mentioned on these last that you have been reading here, 69, 70 and 71. Apparently the run is blank.

By Mr. Rogers:

Q. I show you Defendants' Exhibit 69, was that for a first-run exhibition?

Mr. Wright: If the Court please, the contract speaks for itself.

Mr. Rogers: If the contract is blank, I think I can show through this witness just what run he did play the picture. [fol. 2034] The Court: How do you mean it is blank, in what respect, with respect to the picture shown?

Mr. Rogers: No, sir, with respect to the run.

Mr. Wright: These pictures appear to be pictures of a former season. This may have been the first time that they had played in that town. However, we would deny that these contracts that do not specify first-run are actually contracts for the first-run as the term of "first-run contract" is ordinarily understood.

The Court: Then I think you must rely on the contract and show the circumstances by the witness, if you can.

Mr. Rogers: The point I made, your Honor, is——

The Court: If it is first-run and he can so state, and if counsel says the picture was put on the screen first——

By Mr. Rogers:

Q. Is there any question that these exhibits, 69, 70 and 71, were played first-run at the theatre?

Mr. Wright: We propose to identify and offer later the tabulation prepared by United Artists in response to our interrogatories which will show the play dates of all these [fol. 2035] pictures and where they were played, and what dates.

The Court: Let's limit that to the first-run in this theatre.

Mr. Rogers: That is right.

Q. Is there any question about that, Mr. Wright?

Mr. Wright: I can't tell you that in the absence of the tabulation that will show the pictures from the 1931-32 season on. If they had played in the town during that season they should show in that tabulation.

Mr. Rogers: Then I shall resort to his Honor's suggestion which I think is very constructive.

Q. Mr. Dickinson, I show you Exhibits 69, 70 and 71, and ask you if the pictures set forth in the contracts played first-run at the Palace Theatre, Lockport?

Mr. Wright: I think you ought to define what you mean by first-run.

The Court: At that theatre.

Mr. Wright: I think he ought to ask him whether he knows the picture was previously exhibited in the town.

Mr. Rogers: That would exclude it being first-run.

The Court: In Lockport?

Mr. Rogers: Certainly.

[fol. 2036] A. Will you read the name of that picture?

Q. I will read the name of that picture. It is "Scar Face" and "Tonight or Never."

A. I believe they were first-runs.

The Court: First-run in Lockport?

The Witness: I believe that those were shown at our theatre the first time in Lockport. Perhaps not first-run of that season.

The Court: That was not the inquiry.

(Contract with United Artists 1-27-34 received in evidence and marked Defendants' Exhibit D-72.)

By Mr. Rogers:

Q. Exhibit D-72, contract with United Artists, January 27, 1934, "Cock of Air"?

A. The same answer.

Q. This was run first-run in Lockport?

A. To the best of my recollection.

(Contract with United Artists 1-27-34 received in evidence and marked Defendants' Exhibit D-73.)

Q. Defendants' Exhibit D-73, contract with United Artists 1-27-34 for picture "Bitter Sweet," the same answer to that, first-run?

A. Yes, sir.

[fol. 2037] (Contract with United Artists 1-27-34 referred to received in evidence and marked Defendants' Exhibit D-74.)

Q. Defendants' Exhibit D-74 is contract January 27, 1934, picture "Unholy Garden," the same answer to that?

A. Yes, sir.

(Contract with United Artists 2-16-34 referred to received in evidence and marked Defendants' Exhibit D-75.)

Q. Defendants' Exhibit D-75, contract dated February 16, 1934, picture "Secrets," the same answer to that?
A. I believe so.

(Contract with United Artists 2-16-34 referred to received in evidence and marked Defendants' Exhibit D-76.)

Q. Contract, Defendants' Exhibit D-76, dated February 16, 1934, picture "Emperor Jones," the same answer?
A. Yes, sir.

(Contract with United Artists 2-16-34 referred to received in evidence and marked Defendants' Exhibit D-77.)

Q. Defendants' Exhibit D-77, contract dated February 16, 1934, picture "Private Life of Henry VIII"?
A. The same answer.

(Contract, dated May 7, 1934, referred to received in evidence and marked Defendants' Exhibit D-78.)

[fol. 2038] Q. Defendants' Exhibit D-78, May 7, 1934, picture "Catherine, the Great"?
A. The same answer.

(Contract with United Artists dated February 26, 1934, referred to received in evidence and marked Defendants' Exhibit D-79.)

Q. Defendants' Exhibit D-79, contract February 26, 1934, "The Greeks Had a Word for It," the same answer?
A. Yes, I believe so.

(Contract with United Artists dated June 9, 1934, referred to received in evidence and marked Defendants' Exhibit D-80.)

Q. D-80, contract June 9, 1934, picture "Sorrell & Son"?
A. The same answer.

(Contract with United Artists dated July 28, 1934, referred to received in evidence and marked Defendants' Exhibit D-81.)

Q. Defendants' Exhibit D-81, contract July 28, 1934, picture "Born to be Bad," the same answer?
A. The same answer.

(Contract with United Artists dated 12-15-34 referred to received in evidence and marked Defendants' Exhibit D-82.)

Mr. Rogers: I might note that Defendants' Exhibit D-81 bears on the face of it the fact that it is first-run.

[fol. 2039] (Contract, United Artists, December 15, 1934, referred to received in evidence and marked Defendants' Exhibit D-82.)

Mr. Rogers: Defendants' Exhibit D-82, contract, December 15, 1934, four pictures, "Men of Tomorrow," "Blue Danube," "That's a Good Girl," "Knight of the Garter," on the face of it indicates first-run.

Mr. Wright: I think it should be noted that this says Mundoz Distributing Corporation on the agreement, and these, I believe, are four short subjects and not feature pictures.

Mr. Rogers: It says first-run. At this price they could not be shorts.

Mr. Wright: Ask the witness.

Q. Will you please look at this Defendants' Exhibit 82 and tell me whether those pictures were features or short subjects? In that connection will you please note that it says, "To be run first-run"?

A. I don't remember those.

Q. You don't remember getting any first-run clearance on any shorts you played in the theatre, do you?

Mr. Wright: There is not any evidence that he has had any first-run clearance on anything.

[fol. 2040] Mr. Rogers: This is first-run right on the contract.

The Court: The contract shows for itself.

Mr. Wright: The space opposite "Clearance" is blank.

The Court: Did you say whether they were features or shorts?

The Witness: I don't recall.

(The contract, United Artists, 3-20-35, referred to was received in evidence and marked Defendants' Exhibit D-83.)

Q. Defendants' Exhibit D-83 is a contract, dated March 20, 1935, for two pictures, "Cash" and "Knight of the Garter." Do you recall anything about that?

A. Same answer on that as the preceding.

Mr. Wright: This is also a Mundoz?

Mr. Rogers: Yes, that is a Mundoz.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-84.)

Mr. Rogers: Defendants' Exhibit D-84, contract dated April 22, 1935, picture "Congo Raid," and on the face of it shows first-run.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-85.)

Mr. Rogers: Defendants' Exhibit D-85, contract, April [fol. 2041] 22, 1935, picture "Private Life of Don Juan" and first-run on the face of it.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-86.)

Mr. Rogers: Defendants' Exhibit D-86, contract, April 22, 1935, "Runaway Queen," and first-run on the face of it.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-87.)

Mr. Rogers: Defendants' Exhibit D-87, contract April 22, 1935, "Our Daily Bread," first-run on the face of it.

(The contract, United Artists, April, blank, 1935, referred to was received in evidence and marked Defendants' Exhibit D-88.)

Mr. Rogers: Defendants' Exhibit D-88, contract April blank, 1935, "Transatlantic Merry-Go-Round," first-run.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-89.)

[fol. 2042] Mr. Rogers: Defendants' Exhibit D-89, contract, April 22, 1935, "Clive of India," first-run.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-90.)

Mr. Rogers: Defendants' Exhibit D-90, contract, April 22, 1935, "Follies Bergere," first-run.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-91.)

Mr. Rogers: Defendants Exhibit D-91, contract, April 22, 1935, "Bulldog Drummond Strikes Back," first-run.

(The contract, United Artists, April 22, 1935, referred to was received in evidence and marked Defendants' Exhibit D-92.)

Mr. Rogers: Defendants' Exhibit D-92, contract April 22, 1935, "Affairs of Cellini," first-run.

(The contract, United Artists, May 11, 1935, referred to was received in evidence and marked Defendants' Exhibit D-93.)

Q. Defendants Exhibit D-93, contract, May 11, 1935, "Brewster's Millions," I ask you with reference to that, did that play first-run in Lockport?

[fol. 2043] A. Did you ask me on the other nine ahead of this?

Q. They were all marked first-run. That is why I didn't ask you. This is not marked.

A. I don't remember.

Q. Is it your best recollection that it did play first-run?

A. I don't remember. I probably was in Florida on that date.

Q. You may have been in Florida on that date; is that it?

A. Yes, sir.

[fol. 2044] Mr. Rogers: Exhibit D-94, May 4th, 1935, "Cardinal Richelieu."

Q. Do you recall whether that picture was played first-run?

A. I believe it was.

(Thereupon contract dated May 4th, 1935, "Cardinal Richelieu," referred to, was marked as Defendants' Exhibit No. D-94 in evidence.)

Mr. Rogers: Exhibit D-95, May 14th, 1935, "Les Miserables."

(Thereupon contract dated May 14th, 1935, "Les Miserables," referred to, was marked as Defendants' Exhibit No. D-95 in evidence.)

Q. Do you recall whether that was played first-run?
A. I believe it was.

Mr. Rogers: Defendants' Exhibit D-96, April 22nd, 1935, "Scarlet Pimpernel," first-run.

(Thereupon contract dated April 22nd, 1935, "Scarlet Pimpernel," referred to, was marked as Defendants' Exhibit No. D-96 in evidence.)

Mr. Rogers: Defendants' Exhibit D-97, April 5, 1934, "Rain."

Q. Do you recall whether that was played first-run?
A. It was.
Q. Same answer, you believe it was?
[fol. 2045] A. Yes, sir.

(Thereupon contract dated April 5, 1934, "Rain," referred to, was marked as Defendants' Exhibit D-97 in evidence.)

Mr. Rogers: Defendants' Exhibit 98, May 11th, 1934, "Thunder in East."

The Witness: You are going back to 1934 now?

Q. Yes, that was taken out of order and I am getting them back in order. Now, do you recall whether this was played first-run? I beg your pardon, that was 1935, not 1934.
A. Same answer.

(Thereupon contract dated May 11th, 1935, "Thunder in East," referred to was marked as Defendants' Exhibit No. D-98 in evidence.)

Mr. Rogers: Defendants' Exhibit No. 99, May 11th, 1935, "Let's Have It."

Q. Was that played first-run?
A. I assume so, I don't recall the picture.
Q. You assume it was first-run?
A. Yes, sir.

(Thereupon contract dated May 11th, 1935, "Let's Have it," referred to, was marked as Defendants' Exhibit No. D-99 in evidence.)

[fol. 2046] Mr. Rogers: Defendants' Exhibit 100, October 23rd, 1936, "Escape Me Never," first-run.

The Witness: October, 1936?

Q. Yes. No, it is 1935, I beg your pardon. That is first-run.

(Thereupon contract dated October 23rd, 1935, "Escape Me Never," referred to, was marked as Defendants' Exhibit No. D-100 in evidence.)

Mr. Rogers: Defendants' Exhibit 101, October 23rd, 1935, "Nell Gwynne."

(Thereupon contract dated October 23rd, 1935, "Nell Gwynne," referred to, was marked as Defendants' Exhibit D-101 in evidence.)

Mr. Rogers: Defendants' Exhibit 102, May 11th, 1935, "Uncertain Lady."

Q. Do you recall whether that was played first-run?
A. I don't remember.
Q. It is "Amateur Lady," isn't it?

Mr. Wright: "Amateur Gentleman"?

Mr. Rogers: I don't know, it is some kind of a lady, the handwriting on these contracts is very difficult to decipher.

Mr. Wright: It looks like "Amateur Lady." I don't have any such list. What is the date of it.

[fol. 2047] Mr. Rogers: May 11th, 1935. It looks like "Amateur Lady" to me.

Q. What is your answer?
A. I don't remember.

(Thereupon contract dated May 11th, 1935, referred to, was marked as Defendants' Exhibit No. D-102 in evidence.)

Mr. Rogers: 103, December 27th, 1935, "Red Salute," first run.

(Thereupon contract dated December 27th, 1935, "Red Salute," referred to, was marked as Defendants' Exhibit D-103 in evidence.)

Mr. Rogers: Defendants' Exhibit 104, May 11th, 1935, "Melody Lingers On."

Q. Do you remember that picture?
A. I don't remember.

(Thereupon contract dated May 11th, 1935, "Melody Lingers On," referred to was marked as Defendants' Exhibit D-104 in evidence.)

Mr. Rogers: Defendants' Exhibit 105, two pictures, "Things To Come" and "Stand Condemned," first-run.

(Thereupon contract "Things To Come" and "Stand Condemned," referred to, were marked as Defendants' Exhibit D-105 in evidence.)

[fol. 2048] Mr. Rogers: That contract is dated 9-21-36. Defendants' Exhibit 106 is dated 9-28-36, "Amateur Gentleman," first-run.

(Thereupon contract dated 9-28-30, "Amateur Gentleman," first run, referred to was marked as Defendants' Exhibit No. D-106 in evidence.)

Mr. Rogers: Defendants' Exhibit 107, April 5, 1934, "Street Scene."

Q. Do you recall whether that was played first-run?
A. I am a bit confused, weren't you talking about September, 1936?
Q. You have nothing to do with that, I haven't interrogated you about that at all.
A. This was 1934?
Q. Yes, "Street Scene"?
A. No, I don't remember.

(Thereupon contract dated April 5, 1934, "Street Scene," referred to, was marked as Defendants' Exhibit No. D-107 in evidence.)

The Court: What is the last number?
Mr. Rogers: The last number on that exhibit is 107.

Q. I show you these two copies of letters and ask you whether you recall having received those?
A. These refer to second-run?
[fol. 2049] Q. It says "Second-run"?
A. Yes. I don't remember whether I saw them or not.

Mr. Rogers: I ask to have them marked for identification.

(Thereupon two copies of letters, above referred to, were marked as Defendants' Exhibits Nos. D-108 and D-109 for identification.)

Mr. Rogers: Defendants' Exhibit No. 108 for identification is a letter dated March 28th, 1935, from Robinson to Grafiades.

Defendants' Exhibit No. 109 is a letter dated December 27th, 1934, Robinson to Grafiades.

Q. You do know that Mr. Robinson, K. G. Robinson, Branch Manager, was connected with Paramount during that period, don't you?

A. I assume he was. I knew a Robinson at that time. I don't recall what his initials were.

Q. You knew a Robinson at Paramount?

A. Yes, a manager at Paramount.

Q. Did you know a salesman by the name of Speir connected with Paramount?

A. I don't recall the name.

Q. Well, do you recall being present at a discussion on February 26th, 1936, in the Palace Theatre in Lockport [fol. 2050] and a salesman of Paramount being present, and the playing of features, first-run, was discussed?

A. This is 1936, February?

Q. February, 1936.

A. I believe I was not in town on that date. If I was, I don't remember attending that meeting.

Q. Here are two contracts which I understand were taken out of your file (referring to United States files). No, they were taken out of the distributor's files.

I ask you to look at these two and do you recognize the signature of Mr. Grafiades on those?

A. I recognize the signature. I was looking to see what the company was.

Q. Paramount.

A. This is second-run.

The Court: He is asking you whether you recognize the signature?

The Witness: Yes, I recognize the signature.

Mr. Rogers: I offer them.

(Document shown to and inspected by Mr. Wright.)

Mr. Wright: No objection.

(Thereupon two contracts with Paramount, second-run, above referred to, were marked as Defendants' Exhibits Nos. D-110 and D-111 in evidence.)

[fol. 2051] Mr. Rogers: Defendants' Exhibit No. 110 is a contract dated July 27th, 1934 for three pictures, "Wharf Angel", "Witching Hour" and "Notorious Sophie Lang".

The Court: With whom?

Mr. Rogers: With Paramount.

Defendants' Exhibit No. 111 is a contract dated 4/23/34, also with Paramount, for the pictures "She Done Him Wrong", "Night After Night", "Big Broadcast", "Farewell to Arms" and "Sign of the Cross".

The Witness: Does that show second-run on that? You just read it. Does it say "First-run"?

Mr. Rogers: Contract, Exhibit No. D-110 is first-run and 111 has no run specified on it.

The Witness: I believe that was third-run.

Q. Do you know?

A. My best recollection is the one with "She Done Him Wrong" on would be third-run.

The Court: What do you mean by "third-run"?

The Witness: Having played the town twice before.

Q. You don't know that as a fact, do you?

A. No.

Q. That is just your guess?

A. That is right.

[fol. 2052] Q. Do you remember in August, 1935, or in or about August, 1935, having had some talks with Sydney Sampson of the Buffalo Exchange of Fox, with regard to second-run?

A. We had many talks. I couldn't say just exactly at that time.

Q. Do you remember him definitely speaking to you about giving the Palace Theatre a second-run at that time?

A. Of one picture?

Q. No, second-run, I say.

A. I don't just understand your question.

Q. I mean a seasonal second-run.

A. No, I don't remember that.

Q. You don't remember that at all?

A. No.

Q. Do you remember him offering you any second-run at about that time?

A. It is quite possible.

Q. And do you recall the reason the deal didn't go through was that you could not meet the price?

A. I don't recall that.

Q. Do you recall having a talk or discussion with him at that time about a price second-run?

A. Undoubtedly.

Q. You don't recall that it broke up on account of price?

A. It is quite possible.

[fol. 2053] Q. It is quite possible it did break up on account of price, you mean?

A. Yes, sir.

Mr. Rogers: That is all.

Redirect examination.

By Mr. Wright:

Q. This contract of March 12, 1934, that is marked Defendants' Exhibit 49, can you tell by looking at those pictures and the prices whether or not that was current season's product or old product?

A. My best recollection is that it is old product.

Q. These contracts that were introduced in evidence as Defendants' Exhibits 48 and 47 both appear to bear approximately the same date, do they not?

Mr. Rogers: Do they not bear exactly the same date?

Mr. Wright: That is the way it looks to me. It is a little bit smudged.

A. What is your question?

Q. Do you recall having made those on about the same date?

A. Yes, sir.

Q. And the deal represented by those contracts you have in your hand there, is that the deal you referred to on your direct examination has having been made with Columbia in the winter of 1934-1935?

[fol. 2054] A. That is right.

Q. On your direct examination you testified that that deal was for the 1934-1935 season, did you not?

A. That is right.

Q. If you will look at those I think you will see it is a fact, is it not, that the deal was for two seasons, 1934-1935 and 1936-1936?

Mr. McClennen: What is the date of that franchise?

Mr. Wright: The date of these exhibits is March 19, 1935. It is smudged so that it is not clear whether it is March 1. It looks like March 1, 1935.

Mr. Rogers: It covers two years, does it not, Mr. Wright?

Mr. Wright: It appears that Exhibit 48 covers the 1934-1935 season and that Exhibit 47 covers 1935-1936 season.

Mr. McClennen: How many pictures are included in that franchise?

Mr. Wright: It is apparent on the face of the contract how many were included. I can't add them up for you now.

The Court: Each of the contracts that were made at approximately the same date cover one season?

Mr. Wright: That is right. One was for 1934-1935 and the other for 1935-1936.

[fol. 2055] The Court: Together they cover two seasons.

A. The number of pictures would indicate two seasons, but I do not see any reference to it.

By Mr. Wright:

Q. I call your attention to the printed part at the top there, which says "Schedule for 1935-1935 and schedule for 1934-1935", respectively.

The Court: I take it there is no question about that.

Mr. Rogers: There is no question about that. It is the entire product for both seasons.

Mr. Wright: Except we wanted to give him an opportunity to correct his testimony that he only had one season.

A. I am very familiar with this one, but I don't recall——

Q. You didn't recall at the time that you answered that you had made the contract for both seasons?

A. No, I didn't remember, because these (indicating) played while I was there and these (indicating) played after I left, so that I didn't remember the second contract.

Q. By those played after you left you are referring to 1935-1936 season?

A. Yes, sir.

Q. Those United Artists' contracts, the group dated in April, 1935, is that the group that you referred to in your

direct testimony when you said that you had a first-run deal [fol. 2056] with United Artists for some 1934-1935 product?

A. Yes, sir. My best recollection is that it was 1934-1935 product, which we secured on those later dates.

Q. That is in April, 1935?

A. Yes, sir.

Q. Do you know why you didn't get it before?

Mr. Rogers: I object to that.

The Court: He may state what efforts he made.

Mr. Rogers: I object to the form of the question.

Q. Had you made any efforts to license it before that?

A. Yes, sir.

Q. When was the date when you were first told that you could have it?

A. I can't remember the date. Presumably at the time we signed the contracts for them.

Q. About the date of the contract?

A. Yes, sir.

Q. Do you recall these other pictures that were shown you on these exhibits, 62 to 79, as to how old they were?

A. Can you tell me which company those pictures were? I don't remember the numbers.

Q. Do you remember such pictures as "Unholy Garden"?

A. I can't tell you how old those were.

Q. Do you know, generally, whether those were good [fol. 2057] box-office attractions or bad?

Mr. Rogers: One moment. I object to that.

The Court: Sustained.

Q. Do you recall what you did with those pictures, in the way of receipts?

Mr. Rogers: I object to that as immaterial.

A. Very poor.

The Court: If he can state the amounts, I will let him state. "Poor" is a conclusion.

Mr. Rogers: It would be immaterial anyway. Bad exploitation or bad weather, or anything, might cause it.

Mr. Wright: Or the fact that they were two years old might cause it.

Mr. Rogers: That is conjectural. That is why I object to your question, Mr. Wright.

Mr. Wright: What was the Court's ruling?

The Court: I will strike out the word "poor."

Q. Do you know what you did at the box-office with any of those pictures?

Mr. Rogers: May it please the Court, I press the same objection. Mr. Wright himself says it may have been caused by any number of conditions. It is a pure conjecture, a suppositious question.

[fol. 2058] The Court: I suppose you mean by what he did at the box office the amount he received?

Mr. Wright: Yes, from the public, if he knows.

The Court: I will let him state what he received.

Mr. Wright: Well, if the Court please, the release schedules will speak for themselves. I will not pursue it.

By Mr. Wright:

Q. Other than the group of contracts that was put in evidence with the United Artists, dated in April, 1935, for the 1934-1935 season, did you have any season deal with United Artists?

A. No, sir.

Mr. Rogers: May it please the Court, the testimony up to the present from the witnesses, undisputed, is that United Artists does not sell a season's deal, but sells picture-by-picture, and I therefore move that the answer be stricken.

The Court: I will let it stand. If it is a fact that is true it does not harm you.

Mr. Rogers: I merely wished to note that so that it would register properly with your Honor.

Mr. Wright: That is all for now.

Mr. Rogers: What do you mean "for now"?

[fol. 2059] Mr. Wright: I may recall him.

The Court: Anything further, Mr. Rogers?

Mr. Rogers: If Mr. Wright may recall him I will have to have the same reservation.

The Court: Yes.

Mr. Rogers: That is all.

JOHN A. MAY was called as a witness and duly sworn, was examined and testified as follows:

Mr. Wright: Mr. May is being called for cross-examaination under Rule 43-B.

The Court: Proceed.

Cross-examination.

By Mr. Wright:

Q. You are the Mr. May who is a defendant in this suit?
A. Yes, sir.
Q. Do you know Howard G. Carroll?
A. I do.
Q. How long have you known him?
A. Possibly 15 years.
Q. He was formerly in the employ of the Schine organization?
A. He was.
[fol. 2060] Q. And during what period?
A. I don't recall.
Q. Do you recall what his position was with the company?
A. I do not. I have nothing to do with the operating department.
Q. Who does?
A. Mr. Schine and Mr. Louis Schine.

Mr. Wright: Will you step down, then, please? Mr. Schine, will you take the stand?

J. MYER SCHINE was called as a witness and duly sworn, was examined and testified as follows:

Mr. Wright: Mr. Schine is also being called under Rule 43-B.

Cross-examination.

By Mr. Wright:

Q. You are a defendant in the suit?
A. Yes, sir.
Q. Do you know Howard G. Carroll?
A. Yes, sir.
Q. How long have you known him?

A. I think I knew him—I haven't seen him in the past few years. He is not connected with us any more.

[fol. 2061] Q. He operates the Strand Theatre at Rochester?

A. So I am told.

Q. When did you first meet him?

A. Well, he came for a job and I think it was in the early '30s.

Q. Did you hire him?

A. Yes, sir.

Q. What job did you give him?

A. He was manager of a theatre. I don't recall what theatre, but he was manager of one of our theatres at the time.

Q. When you first hired him?

A. Yes, sir.

[fol. 2062] Q. And then he later became manager of a number of your theatres?

A. Later I believe he had charge of several theatres in Rochester.

Q. He was your manager in the Rochester District, was he not?

A. Yes, sir.

Q. And what period was that?

A. Well, I am not quite positive of it, but I think it was sometime during 1936, '37 or 1935.

Q. What was he doing in October, 1932?

A. I couldn't say, I don't remember.

Q. What is that?

A. I couldn't remember what he did in 1932.

Q. Have you records which show that?

A. I have no records here.

Q. Have you them at Gloversville?

A. I assume we have, yes, sir.

Q. Can you produce those for us?

A. Here.

Q. In court?

A. I haven't got them here.

Q. How long will it take you to produce them?

A. It will take several days, I imagine.

Q. Is there anybody here that will know what Mr.

[fol. 2063] Carroll was doing in October, 1932?

A. Here in court?

Q. Yes.

A. I don't think there is anybody here now.

Q. Have you anybody available who can supply that information?

A. In court?

Q. In town?

A. No.

Mr. Wright: You can step down. If the Court please, we will recall Mr. Dickinson for the purpose of offering the testimony with respect to that conversation and we expect to connect it up.

The Court: Conversation with Carroll, you mean?

Mr. Wright: Yes, Mr. McClennen stated at the time, I believe, that Mr. Carroll was unknown to them. I suggested that he held the position as District Manager and on the objection the testimony was excluded. I again renew the offer to connect him up. We can procure the records from the Schine Company to show it.

The Court: Why not produce the record first?

Mr. Wright: If the Court please, this witness lives in West Virginia.

[fol. 2064] The Court: I thought it was in Lockport.

Mr. Wright: No, it is West Virginia.

The Court: You want to show some conversations between the witness and Carroll?

Mr. Wright: Yes.

The Court: I will receive it. Step forward, Mr. Dickinson. It is subject to it being connected up and showing Carroll's connection with the defendant.

Mr. Wright: I take it Mr. Schine will produce within a few days the records which show what position he held in October, 1933.

Mr. McClennen: You said 1932, Mr. Wright, didn't you?

Mr. Wright: October, 1933 is the date.

Mr. McClennen: Before we get away from this I want to note that Mr. Wright's paraphrasing of what I said about Mr. Carroll is not accurate. The record will show what I said.

Mr. Wright: That is right. Whatever was said is clearly on the record.

[fol. 2065] CHARLES E. LICKINSON, JR., recalled by and on behalf of the Plaintiff, testified as follows:

Further direct examination.

By Mr. Wright:

Q. I call your attention, Mr. Dickinson, to the month of October, 1933. Did you, during that month, have a conversation with Mr. Howard Carroll?

A. I did.

Q. And where did it occur?

A. At the Rialto Theatre.

Q. At Lockport?

A. In Lockport.

Q. Who else was present?

A. I don't recall that any one was.

Q. Can you fix the date of that conversation with a little more accuracy than the month of October?

A. It was two or three days prior to October 21, 1933, the opening date of the Hi-Art Theatre, the re-opening date.

Q. What was the conversation?

Mr. McClennen: To that we object, your Honor. The situation is the same as when you excluded it before.

[fol. 2066] The Court: Well, under the circumstances of this witness, I think I should receive it subject to its being stricken out.

The Witness: Mr. Carroll told me that he was calling to see me to talk with me about accepting the offer that had been previously made to me by Mr. May, namely, about $16,000 and a percentage of the net per year for the lease, which Reliance Theatres held and that the Schine organization was withholding opening the Hi-Art Theatre, giving us that additional few days to decide whether or not we would accept their proposal.

Q. What did you say?

Mr. McClennen: That is the same objection.

The Court: Same ruling.

The Witness: And I said we weren't interested.

The Court: Is that "Hi-Art" spelled H-i-A-r-t?

The Witness: Yes, sir.

Q. Was there anything further said?

A. No, sir.

Q. Was there any conversation with reference to the policy the Hi-Art would be operated on?

A. No, sir., not that I recall.

[fol. 2067] Mr. Wright: You may cross-examine. What was that question and answer by the Court?

(Proceeding question by the Court read.)

The Court: Is there any cross-examination?

Mr. Rogers: Are you finished, Mr. Wright?

Mr. Wright: Yes.

Mr. Rogers: No further examination.

The Court: We will suspend for five minutes.

(Short recess.)

[fol. 2068] MAX H. ROSE, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Rose?

A. Brooklyn, New York.

Q. What is your occupation?

A. I am an attorney in the employ of Schwartz & Frohlich, Counsel to Columbia Pictures.

Q. Were you designated by Columbia to assemble the material that was subpoenaed for production at the trial of this case by the Government?

A. I was.

Q. Have you brought with you, pursuant to the subpoena served upon Columbia, this envelope of correspondence?

A. This contains some of the documents that were called for by those subpoenaes.

Q. I was referring specifically to inter-office memorandum and contract recommendations which were set forth in that list which was previously supplied to you.

A. Yes, those were in response to that list.

Q. Those are the ones that are contained in the envelope?

A. Yes. May I have that for a moment to see that there [fol. 2069] is nothing in there that was not on the list (examining). That is correct.

Q. Those documents are in here in chronological order, are they?

A. Well, they are in numerical order. Yes, sir, in chronological order also.

Q. They are marked for identification by numbers 655 through 670, inclusive?

A. I don't know. If you will check you can see.

Q. Will you look at them and see?

A. They are marked beginning No. 655, and the last number is 670.

Q. And those were all produced from the files of Columbia?

A. They were.

(The documents produced by Columbia referred to were marked as Plaintiff's Exhibits 655 to 670, inclusive, for identification.)

Q. Q. Have you with you the subpoenaes that were served upon Columbia for production of certain contracts?

A. Yes, sir.

Mr. Wright: I will ask to have this one that you have produced, returnable May 19, 1944, marked with the next Plaintiff's exhibit number for identification.

[fol. 2070] (The subpoena, May 19, 1944, referred to was marked as Plaintiff's Exhibit 671 for identification.)

Q. I hand you this folder, which is marked paragraph 2, subpoena, May 19, 1944, and ask you if those are all of the documents that were produced in response to paragraph 2 of this subpoena identified as Exhibit 671?

A. That is correct.

Q. And I hand you this folder marked paragraph 4, the same subpoena, and ask you if those are all of the documents produced in response to paragraph 4 of Exhibit 671 for identification?

A. That is correct.

Q. Were any documents produced by you in response to paragraph 3 of this subpoena?

A. No. I was not able to find any of those amongst the papers that I brought to Buffalo.

Q. You made a search for them?

A. Amongst those papers, yes. There are license agreements in existence somewhere that would response to that

paragraph, but I don't appear to have those with me in Buffalo at this time.

Q. Are you still searching for them?

A. I will make a search when I get back to New York.

Mr. Wright: May it be understood that when and if Mr. Rose produced those they can be authenticated without his [fol. 2071] coming back here, if he writes you a letter saying what they are?

Mr. McClennen: Unless there is some occasion when it arrives for us to want to ask him something. If such a list is prepared, with a statement signed by Mr. Rose as to what it is, very likely we shall not ask to have him come back, but we do not want to be bound in advance to that position.

By Mr. Wright:

Q. Did you produce any documents in response to paragraph 5 of this subpoena?

A. Yes, I did. Those documents are included within the documents that were produced by me in response to paragraph 2.

Q. The only documents you have in response to that paragraph are included in the folder marked paragraph 2 of the same subpoena?

A. That is right.

Q. Does this folder marked paragraph 6 of the same subpoena contain all of the documents you have produced in response to paragraph 6 of that subpoena?

A. That is correct.

Q. What, if any, documents have you produced in response to paragraph 7 of that subpoena?

[fol. 2072] A. The documents in response to paragraph 7 are included within the documents produced in answer to paragraph 2.

Q. The documents produced in response to paragraph 13 of that subpoena are in this folder that has been so marked?

A. That is correct.

Q. And the documents you have produced in response to paragraph 14 are contained in the folder that is marked paragraph 14?

A. That is correct.

Q. And have you produced any in response to paragraph 15?

A. The documents which I have produced in response to paragraph 15 were delivered by me yesterday to the Government and part of those have been marked in evidence.

Q. Those are the ones that were produced in court here during the examination of Mr. Dickinson?

A. That is correct.

Q. The ones that are not in evidence are those contained in this folder I just handed you?

A. That is correct.

Mr. Wright: This folder is marked 15.

[fol. 2073] Q. The documents produced in response to paragraph 16 of that subpoena are those contained in this folder marked "Paragraph 16"?

A. That is correct.

Q. And those produced in response to paragraph 19 of this subpoena are those contained in these two folders, both marked paragraph 19?

A. That is correct, except that part of the documents called for by paragraph 19 are included in the documents in the previous folders.

Q. Well, which are those?

A. Well, the documents for Harlan, Kentucky, were produced under paragraph 6. The documents for Paris, Kentucky, were produced under paragraph 2. The documents for Lexington, Kentucky, under paragraph 4. The documents for Corbin, Kentucky, under paragraph 2.

Q. With those exceptions, the documents called for by paragraph 19 of this subpoena are contained in these two folders that are marked paragraph 19?

A. The documents which I produced are so contained.

Mr. Wright: We will ask to have these folders that have been marked paragraph 2, 4, 6, 13, 14, 15 and 16, marked consecutively as Plaintiff's Exhibits 672 through 678, inclusive for identification.

[fol. 2074] (Thereupon folders marked paragraphs 2, 4, 6, 13, 14, 15 and 16, referred to, were marked as Plaintiff's Exhibits Nos. 672 through 678, inclusive, for identification.)

Mr. McClennen: Is there within the folder a list of the documents?

Mr. Wright: The lists I believe have not yet been put in there. They will be listed, and you will be supplied with

copies of the lists as you were with respect to the other folders.

Also mark these two folders, which are numbered paragraph 19 as Plaintiff's Exhibit, 679 and 679-A, respectively, for identification.

(Thereupon two folders numbered paragraph 19, above referred to, were marked as Plaintiff's Exhibits 679 and 679-A, respectively, for identification.)

The Court: The folders are marked showing the paragraph?

Mr. Wright: That is right, your Honor.

The Court: The paragraphs in the subpoena?

Mr. Wright: Correct.

Q. I will show you this subpoena to Columbia Pictures Corporation, returnable August 15, 1944, and ask you if that was served on Columbia?

[fol. 2075] A. Yes, sir.

Mr. Wright: And we will ask to have that marked the next exhibit number.

(Thereupon subpoena to Columbia Pictures Corporation, returnable August 15, 1944, referred to, was marked as Plaintiff's Exhibit No. 680 for identification.)

Q. Are the documents you produced under paragraph 1 of this subpoena marked 680 for identification, contained in this folder marked paragraph 1 of the subpoena?

A. That is right.

Mr. Wright: I will ask to have that marked as Plaintiff's Exhibit 681 for identification.

(Thereupon documents produced under paragraph 1 of subpoena, marked as Plaintiff's Exhibit 681 for identification.)

Q. And the documents produced in response to paragraph 3 of this subpoena are contained in the folder marked paragraph 3 that you have there?

A. That is right.

Mr. Wright: I will ask to have that marked as Plaintiff's Exhibit No. 682 for identification.

(Thereupon documents produced in response to paragraph 3 of subpoena, contained in folder, referred to, was marked as Plaintiff's Exhibit No. 682 for identification.)

[fol. 2076] Q. Was Columbia Pictures also served with this subpoena returnable October 2nd, 1944?

A. That is correct.

Mr. Wright: I will ask to have that marked as Plaintiff's Exhibit 683 for identification.

(Thereupon subpoena returnable October 2nd, 1944, referred to, was marked as Plaintiff's Exhibit No. 683 for identification.)

The Court: Are you marking the subpoena?

Mr. Wright: Yes, the subpoena contains a description of documents in each paragraph.

The Court: All right.

Q. Do you have there the documents that have been produced in response to paragraph 3 of this subpoena of October 2nd?

A. I have produced some documents called for by that paragraph, the documents relating to the Capitol Theatre at Ilion, New York, and those are contained—I don't know for the moment where they are contained.

Q. Those you have referred to as having been produced are contained in this folder marked paragraph 3, October 2nd, 1944?

A. That is correct.

Mr. Wright: I ask to have that marked as Plaintiff's [fol. 2077] Exhibit No. 684 for identification.

(Thereupon folder, containing documents, marked paragraph 3, October 2nd, 1944, above referred to, was marked as Plaintiff's Exhibit No. 684 for identification.)

The Witness: The remaining documents called for by that paragraph I have been unable to find among the papers I have brought to Buffalo with me, but I propose continuing the search, and I shall be glad to send them here as and when I find them. I know there are such contracts in existence or have been.

Q. You are referring to contracts for the Capitol Theatre, Ilion, New York, through the season 1936-1937?

A. No, I am referring to the Madison, Rochester and Monroe Theatres, Rochester.

Q. The papers you produce here for Ilion?

A. Yes, sir.

Q. When you locate those contracts will you also send a letter to counsel setting forth what the facts are as to them coming from your files?

A. Surely, and you want them transmitted to you, I suppose?

Mr. Wright: If that is agreeable to Mr. McClennen.

Mr. McClennen: As far as the transmitter is concerned, yes.

The Witness: No, I was referring to the contracts them-
[fol. 2078] selves.

Mr. Wright: He wants to know if it is agreeable if he forwards them to us with a letter describing them to you?

Mr. McClennen: Certainly. Of course, they will be equally available to us when they arrive, I take it?

Mr. Wright: Yes.

Q. I show you this contract previously marked for identification as Exhibit No. 43, and ask you if that also came from the Columbia files?

A. Yes, sir, it did.

Mr. Wright: Would you mark this document for identification as Plaintiff's Exhibit No. 685 for identification.

(Thereupon a thick volume of answers to interrogatories was then marked as Plaintiff's Exhibit No. 685 for identification.)

Q. I hand you this document, marked as Exhibit No. 685 for identification, and ask you if you can say what that is?

A. Those are answers to interrogatories, answers by Columbia Pictures Corporation.

Q. Interrogatories propounded by the Government at the
[fol. 2079] time Columbia was still a defendant in the suit?

A. That is right.

Q. Would you describe briefly the—or—I call your attention to the part of the answer beginning at page 20, referred to as a schedule and ask you to state if you know how this schedule was prepared?

Mr. McClennen: Was it prepared by this witness?

Mr. Wright: I should have asked him that first.

Q. I was referring simply to schedule "A"; first, was this schedule prepared under your supervision?

A. It was.

The Court: You ought to describe it.

Mr. Wright: It is marked Schedule "A" in answer to interrogatory No. 14.

Mr. McClennen: Is the document you have there the one filed in court?

Mr. Wright: I believe this is a copy of the one filed in the court, is it?

The Witness: This, I believe, has never been filed, because this comprises part or all of what we deemed confidential answers to interrogatories, and they were delivered to the Government subject to the following conditions, I quote:

"This information is furnished with the understanding [fol. 2080] that it will remain in the confidential files of the Department of Justice, and that no part thereof will be disclosed to the other parties to this suit, or to any third parties".

[fol. 2081] Q. The figures that are set forth there represent, do they not, in this schedule the titles of the features released by Columbia during the seasons 1931-1932 through 1939-1940, together with the dates on which they played the Schine towns and theatres in those towns?

A. They contain that information with respect to the towns which are listed in the interrogatories.

Q. I take it the name of the town is listed at the top of the schedule?

A. That is right.

Q. And the theatre is underneath the town?

A. Yes, sir.

Q. And they also contain opposite the play dates the film rentals paid?

A. That is correct.

Q. Have you satisfied yourself as to the accuracy of those figures?

A. They are about as accurate as they can be had.

Q. Do you have any records at Columbia that are any more accurate, with respect to the facts that are set forth there?

A. I would say not. The reason I answer that way,

qualifying it, is that I would say that these compilations are probably more accurate than the original records, because these compilations have been carefully examined [fol. 2082] after they were prepared, and in certain instances where they appeared to be error we checked back of the records.

The Court: Is that schedule the same as the one that was offered in answer to the interrogatories?

The Witness: That is the schedule that was offered.

The Court: Was there a copy of those offered?

The Witness: This is the copy that was given to the Government.

By Mr. Wright:

Q. I suppose Columbia has an original of its own and they supplied us with this; is that right?

A. That I think is true.

Mr. McClennen: I understood from the witness's earlier answer that no answers have ever been filed.

Mr. Wright: The ones which were not filed in court were those that he regarded as confidential.

By Mr. Wright:

Q. Were there answers filed in court?

A. Yes, those that were not marked confidential were filed.

Mr. McClennen: These schedules from which the witness is now speaking have never been filed in court.

The Witness: That is correct, not to my knowledge.

By Mr. Wright:

Q. With reference to the confidential nature of the [fol. 2083] information furnished, if it appears that the Court regards any of the information there as relevant to the lawsuit, do you have any objection to producing it in this form or would you then prefer to be subpoenaed for the other records?

A. Frankly, I didn't anticipate this question arising. It didn't occur to me. I had forgotten that part of these interrogatories were confidential and therefore I am not authorized to answer that question. I can speculate as to

what the answer will be, and if I can make a telephone call I can get you an answer in a very few minutes.

Mr. Wright: We do not care to reveal any of them now except in so far as we may wish to offer some of the facts which have become pertinent to a certain situation.

The Court: You will probably have to subpoena them now.

Mr. Wright: He has testified these are the best records they have of these facts. The only question, I take it, is whether they wanted to reserve the particular privilege that was attached to these at the time of filing or whether they would insist that subpoenas be served.

Mr. McClennen: If your Honor please, we are not con-
[fol. 2084] cerned with this matter, but if any portion of any schedule is to be used we want access to the entire schedule so that we can see whether what is produced is consistent with the rest and whether there is in the schedule that which we want to put in.

The Court: The Court might have to examine those to determine that.

Mr. Wright: We would certainly have no objection to Counsel examining any of the schedule at any time.

Mr. McClennen: It has never been possible for us to examine and is not now, as I understand it.

Mr. Wright: There is no objection to it, in so far as the Government is concerned.

By Mr. Wright:

Q. Will you check on that, Mr. Rosé, as to whether or not there would be an objection now on the part of Columbia?

A. I will.

Mr. Wright: That is all.

Cross-examination.

By Mr. McClennen:

Q. Are you familiar yourself with the filing systems of your company?

A. Yes, I am.

[fol. 2085] Q. These voluminous papers that you have produced, do they come from the New York office?

A. In part and in part from the branch offices.

Q. Collected to supplement what you had in the New York office or as the easier way of getting the papers?

A. No, what we did, we assembled all of the contracts in the New York office and then found that there were, obviously, certain contracts not there, so that we asked the branch offices to send us the contents of their files.

Q. Who has done the checking to see that these contracts were the active contracts under which the supply of pictures took place?

A. I don't know that I understand you, but each of those contracts have at one time or another been examined by me.

Q. What I have particularly in mind, contracts after they are made sometimes get cancelled or releases or ignored in some way. Is there any way in which we can be assured whether these were live and performed contracts?

A. Not from an examination of the contracts themselves.

Q. Is there any way in which we can be assured that in fact the searches have resulted in the production of all the contracts that did come into existence?

[fol. 2086] A. Well, I will say this, that we made an exhaustive search at the outset at the time that Columbia was a defendant in this lawsuit, and when this case originally came on for trial I would say that we had about as complete a file of contracts as it was humanly possible to assemble at that time. Since that time these files have been subject to examination by the Government on various occasions, and on at least one occasion by the defendant Schine, and except to the extent that contracts have gone astray by reason of those examinations they are in the same condition that they were at the time that we were a defendant in this case.

Q. Are there in the folders incidental papers other than the contracts?

A. Not in these folders, no, sir.

Q. In the original keeping of the contracts, I mean the physical handling of the contracts, are the contracts to be found in separate folders for each theatre to which they relate?

A. You mean by the Company or after the preparation began?

Q. I mean as the files were before there was any litigation at all.

A. It would depend on whether or not the theatre were a member of a circuit, whether it was operated as a single unit or part of a larger unit. Where the theatre is operated [fol. 2087] as a single unit all of the papers in connection with that theatre are kept in a single file, or a series of files, depending on the lapse of time.

Q. Is that a loose file?

A. It is open on three sides, if that is responsive to your question.

Q. Are the documents therein spiked together or laid loose?

A. Most frequently the contracts and certain parenthetical material, certain descriptive material in the documents, are spiked together.

Q. Who handled the unspiking in the process of collecting these for the purposes of Columbia's preparation originally of the material for the case?

A. That was done in part by me and in most part by persons working under my supervision.

Q. Among these papers identified was there a folder that contained your release schedules?

Mr. McClennen: Mr. Wright has handed me Exhibit 682 for identification.

Q. Are the schedules in there schedules of the pictures that have actually been released on the particular dates set out in the margin or pictures which it was in contemplation would be released at those dates?

A. I think both of those statements are true, sir.

The Court: What was your answer?

[fol. 2088] A. I said I think both of those statements are true. In part they reflect releases that had been made previously and in part they reflect anticipated releases. I think you will notice, if you will look at the bottom of those particular schedules, that in certain instances the release date is left blank. Those pictures had not been released at the time those schedules were prepared.

Q. I notice that the earliest schedule is as of August 1, 1939. Is that because you did not locate any earlier or that you were not asked for one any earlier?

A. We did not locate any earlier.

Mr. McClennen: That is all.

Mr. Wright: There was one supplemental schedule of the same class as this one which was marked 685 that I meant to have marked but didn't. I will ask to have this document entitled "Further answers to interrogatories" marked as Plaintiff's Exhibit 685-A for identification.

(The document entitled "Further answers to interrogatories" referred to was marked as Plaintiff's Exhibit 685-A for identification.)

[fol. 2089] Redirect examination.

By Mr. Wright:

Q. Mr. Rose, would the same testimony that you gave with respect to Schedule A in this Plaintiff's Exhibit 685 apply to Schedule B in Exhibit 685 for identification?

A. It would.

Mr. McClennen: Do I understand that we may now examine those schedules?

Mr. Wright: It is entirely agreeable to the Government. As I understand it, Mr. Rose would like to make a check with his Company.

Mr. McClennen: That is just what I wanted to be definite about. As far as those interested are concerned we may look at them. I want to look at them. I don't want to be derelict in respect to the desires of the Company if the Government has not yet been permitted to release those for our inspection. I just want to be sure what the situation is.

The Court: We have not quite come to that. They have not been offered in evidence as yet. They are marked simply for identification.

[fol. 2090] Mr. McClennen: Yes, but the Government says we may look at them, as far as the Government is concerned with that permission. I want to look at them now providing I am doing no disrespect to the desires of anybody interested.

The Court: Well, there is no disrespect to the Court. The witness says he wants to take the matter up with somebody before the examination is made.

Mr. McClennen: So that, as a matter of fact, I am not permitted to see them yet?

Mr. Wright: Could I ask just one more question to complete the examination?

The Court: Surely.

By Mr. Wright:

Q. I have here the original of the answers filed by Columbia with the Clerk of the Court, and I call your attention to these pages which are headed "Season 1931-32 through season 1939-40", and ask you if that is the most accurate compilation you have of the titles of the features released, together with their dates of release?

A. Yes, sir.

Mr. Wright: Could we have those pages then copied into the record as what the witness has just stated them to be?

[fol. 2091] Mr. McClennen: Yes. Why don't you mark it as an exhibit to save copying it?

Mr. Wright: The only difficulty in marking it as an exhibit is that I wasn't offering all of it. There was other material in it.

Mr. McClennen: Haven't you got a copy of those answers to interrogatories that you can take that schedule out of and mark it as an exhibit?

Mr. Wright: May it be understood that the next exhibit will be this list of the release dates and features of Columbia during those seasons I have mentioned as set forth in this answer to the interrogatories?

The Court: 686, then. That is a better way.

(Thereupon Exhibit No. 686 was reserved for a list of release dates and feature titles to be later supplied by Mr. Wright, counsel for the Plaintiff.)

The Court: We will adjourn until 2 o'clock.

(Whereupon, a recess was taken until 2 o'clock P. M.)

[fol. 2092] After recess, 2 o'clock P. M.

Appearances: As before noted.

SETH RAISLER, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Wright: Before examining Mr. Raisler, if the Court please, I would like to note that the list of Paramount releases, supplied by the Witness Morgan, together with his letter to Mr. McClennen and myself, has been marked as Plaintiff's Exhibit No. 687 for identification.

(Thereupon list of Paramount releases, together with letter to Mr. McClennen and Mr. Wright, referred to, was marked as Plaintiff's Exhibit No. 687 for identification.)

Direct examination.

By Mr. Wright:

Q. Mr. Raisler, where do you live?

A. 102-206th Street, Laurellton, Ohio.

Q. What is your occupation?

A. I am assistant to the Assistant General Sales Mana-
[fol. 2093] ger of Columbia Pictures.

Q. How long have you held that position?

A. The past seven years.

Q. Are you familiar with the sales personnel and their duties in the Columbia organization?

A. Yes, sir.

Q. Can you tell us what Mr. Phil. Fox' position with the company is?

A. Mr. Phil. Fox, at the present time, is the Branch Manager of the Buffalo Exchange.

Q. How long has he held that position?

A. If you don't mind, I have checked the records before I came here, and I have the exact date.

Q. You can refer to your notes.

A. Mr. Fox has been in Buffalo from May 18th, 1935 to——I am sorry—he has been in Buffalo since May 22nd, 1939.

Q. What was his position before that?

A. Before that he was Branch Manager at Albany.

Q. For what period?

A. The period from May 18th, 1935 through May 22nd, 1939.

Q. Do you know what position Mr. Rube Jackter holds?

A. He is the Assistant General Sales Manager of Columbia Pictures.

Q. How long has he held that position?

A. Since approximately 1932.

[fol. 2094] Q. That is, he assumed it some time in the year 1932?

A. I believe so, to the best of my recollection.

Q. The General Sales Manager is who?

A. The General Sales Manager is Mr. Montague.

Q. Mr. A. Montague?

A. Mr. A. Montague.

Q. Do you know how long he has held that position?

A. He has been there since 1933 in that position.

Q. What are Mr. Montague's duties as Sales Manager?

A. Mr. Montague's duties in general are to establish the policy of sales, and at the same time as representative between the home office sales department and the executives, the administrative offices of the company and studio.

Q. What are Mr. Jackter's duties?

A. Mr. Jackter's duties are confined to the approval or rejection of contracts and hiring of sales personnel including branch managers and divisional managers.

Q. And what were Mr. Fox' duties as Branch Manager during the period you mentioned?

A. He was in charge of the sales force whose main purpose was to solicit applications for motion picture contracts from local exhibitors.

Q. Mr. C. N., or is it C. W. Johnson?

A. C. N. Johnson.

[fol. 2095] Q. Held what position with your company?

A. He was from the period August 7th, 1931, through May 18, 1935, Branch Manager of Albany.

Q. There is no C. W. Johnson employed by the Company?

A. Our records don't reveal that.

Q. Mr. Louis Weinberg, what position does he hold with the company?

A. That position we designate as circuit sales manager.

Q. He holds that position now?

A. He does.

Q. How long has he held that position?

A. I would say for at least 12 years.

Q. What are his duties?

A. His duties are confined to major circuits, to solicit their applications for the Columbia product.

[fol. 2096] Q. Does that term "Major Circuit" as you used it include the Schine circuit?

A. Yes, it does.

Q. Mr. Joe Miller holds what position with Columbia?

A. At the present time Mr. Joe Miller is the branch manager of the Albany office.

Q. How long has he held that position?

A. Since May 22, 1939.

Q. What was his position prior to that?

A. Prior to that he was branch manager of the Buffalo office.

Q. For how long?

A. From August 7, 1931.

Q. To——

A. Up to the time he went to Albany, which was May 22, 1939.

Q. Who is the manager at your Cleveland office?

A. At the present time, Mr. Lester Zucker.

Q. How long has he held that position?

A. Since February 15, 1937.

Q. Who was the manager at Cleveland before that?

A. Mr. H. C. Bissell.

Q. How long did he hold that position?

A. He was there from August 7, 1931, through February 13, 1937.

Q. Mr. Bissell and Mr. Zucker and Mr. Miller all had the same duties as the other branch managers you described?

[fol. 2097] A. Yes, sir.

Q. Who is your branch manager at Cincinnati?

A. Mr. Allen S. Moritz.

Q. How long has he held that position?

A. Since September 1, 1931, up to the present time.

Q. Who is the manager of the Washington, D. C., exchange?

A. At the present time?

Q. Yes.

A. Mr. Ben Caplon.

Q. How long has he held that position?

A. For the past year, approximately.

Q. Who was manager there before that?

A. Mr. Sam Galanty.

Q. For how long?

A. Since August, 1931.

Q. And the duties of Mr. Galanty and Mr. Caplon and Mr. Moritz are the same as those of the other branch managers you have described?

A. In general they are, with one qualification.

Q. What is that?

A. That Mr. Galanty, in addition to being Washington branch manager during that period was also the division manager in charge of several other branches.

Q. What were the other branches?

A. Pittsburgh, Cleveland, Cincinnati and Washington.

[fol. 2098] Mr. Wright: That is all.

Mr. McClennen: No questions.

James A. White, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. White?

A. Lockport, New York.

Q. What is your occupation?

A. Mechanical engineer.

Q. Employed by whom?

A. The General Motors Corporation, Harrison Division.

Q. Were you formerly an executor of the Estate of Charles Dickinson?

A. Yes, sir.

Q. Of Lockport?

A. Yes, sir.

Q. During what period was that?

A. May I refer to notes?

Q. Yes.

A. Mr. Dickinson died on December 7, 1933, and we became executors in 1934, in the early part of 1934.

[fol. 2099] Q. When you say "we" who are you referring to? Who were the other executors?

A. Mrs. Dickinson and Mr. LeGrand O. Robson of Lockport.

Q. And you served as such until when?

A. Some time during 1936 I believe we were discharged.

Q. And among the assets of Mr. Dickinson's estate was the Palace Theatre at Lockport?

A. Yes, sir.

Q. Were you approached at any time—did you have any conversation with any representatives of the Schine interests with reference to a purchase of that theatre or lease of the theatre from the Estate?

A. We met with Mr. Schine in 1935, May 21, 1935, in Rochester.

Q. What led up to that meeting?

A. I believe—I am not just certain on this point, but I believe there were several conversations with Mr. Fogle, our attorney, before that meeting.

Q. Well, do you know who initiated the conversations?

Mr. McClennen: Just a moment. That is objected to.

Mr. Wright: I am asking if he knows.

The Court: He may state what was said. What was first said about it? What talk did you have about it and with whom?

Q. What was the first conversation you had with any one [fol. 2100] with reference to this meeting with Mr. Schine?

A. I can't recollect just the things that led up to this conversation in Detroit—in Rochester, I mean.

Q. This was Rochester where the conversation you had was?

A. We met in Rochester.

Q. What was that date, again?

The Court: May 21, 1935.

Q. Where did the conversation occur in Rochester?

A. In the Seneca Hotel.

Q. Who else was present?

A. Mr. Robson and, I believe, Mrs. Shannon was with us, and possibly Mr. Fogle, but I am not sure of that.

Q. Mrs. Shannon?

A. Mrs. Dickinson. She later became Mrs. Shannon.

Q. And Mr. Fogle was the attorney for the executors?

A. Yes, sir.

Q. What is his first name?

A. Carl.

Q. Who else was present there?

A. I believe Mr. Schine and Mr. May.

Q. Which Mr. Schine, do you recall?

A. I don't know his initials; I am sorry.

Q. The gentleman sitting here (indicating)?

A. Yes.

Q. Mr. Myer Schine?

[fol. 2101] A. That is right.

Q. And Mr. May?

A. Mr. May.

Q. What was the conversation then?

A. I can't tell you the conversation. The general drift of it was that we wanted to sell the theatre and he was a possible customer.

Q. Will you just tell us the substance of what was said on each side?

A. I can't tell you the conversation. I don't remember.

Q. Don't you have any notes from which you can refresh your recollection?

A. May I look at my papers? I think possibly I have.

[fol. 2102] Q. Surely.

A. I have this note dated May 21, 1935, 2:45 P. M. "Mr. May phoned from Hamilton, Ohio, that he and Mr. Schine would be at Hotel Rochester tomorrow, and could see us after lunch; would like us to phone him in morning to make definite arrangements. If we cannot see him in Rochester he will be in Lockport Thursday."

After that note he sent a telegram to Mr. Myer Schine, Gloversville, New York. This is May 21. "Wire earliest date and place convenient to meet you on strictly confidential matter."

That was previous to our conversation in Rochester so you can see there was some preliminary contact there. Just what that was, I could not say.

Q. What I asked you for was whether you had a memorandum or note there of the conversation itself?

A. No, I haven't. I just looked here to see that.

Q. You have no——

A. The general discussion was the theatre.

Q. Just a minute. You say you have no memorandum of that conversation?

A. No, sir.

Q. Can you recall discussing that conversation with me in the office down here a day or two ago?

A. I showed you an agreement.

[fol. 2103] Mr. Rogers: One moment, please. Answer the question, Mr. White.

The Court: The question is, can you recall a conversation with him?

The Witness: With you?

Q. Yes.

A. Yes.

Q. Didn't you at that time have a memorandum of the conversation with you?

A. I don't believe so, and I haven't it here in my papers. I don't think I had that.

Q. What was the agreement you referred to there?

A. There was an agreement submitted to us, or an offer in the form of an agreement on the 17th day of June, 1935, making us an offer for the theatre.

Q. That is this document you have in your hand?

A. Yes, sir.

Mr. Wright: I will ask to have that marked for identification as Exhibit No. 688.

(Thereupon form of an agreement, dated June 17th, 1935, referred to, marked as Plaintiff's Exhibit No. 688 for identification.)

Mr. Rogers: That is the date of that?

Mr. Wright: The date—it is unsigned but it is June 17th, 1935.

[fol. 2104] Mr. Rogers: Thank you.

Q. Was the draft, or was this offer that has been marked Exhibit 688 discussed at that meeting in May?

A. I can't hardly think so, because this agreement was written after that meeting.

Q. Well, it is dated after that meeting; you think it was, but I am asking you——

A. This is the result of it.

Q. What is that?

A. This is the result of the meeting. I presume at that meeting we asked for an offer in writing and this was submitted to us.

Q. That was the offer that came out of the meeting?

A. Yes, sir.

Q. And you don't have any recollection of what the conversation was other than the fact that an offer was made which was later put in the form of this Exhibit 688?

A. I doubt if this offer was made at that meeting.

Q. Well, what was said at the meeting as near as you can recall?

A. I regret that my memory isn't of that type. I can't tell.

Q. You are unable to locate a memorandum of that conversation now?

A. Unfortunately not, no, I can't find it.

[fol. 2105] Q. Then what if any action was taken by you and your fellow executors with reference to that offer that is marked as Exhibit 688 for identification?

A. We decided the price was insufficient and it was not practical for us to accept the terms.

Q. You rejected it?

A. We rejected it.

Q. Do you know what the assessed valuation of the property that is covered by that offer was?

Mr. McClennen: Just a moment, that is objected to.

The Court: Assessed value? Is that evidence of value?

Mr. Wright: I would think it would be evidence of the minimum value.

The Court: Of what value?

Mr. Wright: I said that would be evidence, I should suppose, of the minimum value of the theatre property, its assessed valuation.

The Court: Property is sometimes assessed far more than they are worth.

Mr. Wright: I submit that the matter—I think it might be one element that would be relevant to the terms.

The Court: The better evidence would be the testimony of the witness.

[fol. 2106] By Mr. Wright:

Q. Did you make any effort to determine what you thought was the fair value or price for that property at that time?

Mr. McClennen: That is objected to, if your Honor please, immaterial what they did.

The Court: What?

Mr. McClennen: Immaterial what they did to determine what they thought was the value.

The Court: This calls for a "Yes" or "No" answer. Did he make any inquiry? What is your answer, Mr. White?

The Witness: I would say we did, yes, determine that.

Q. What was the fair value of that property in your opinion at that time?

Mr. McClennen: That is objected to.

The Court: Well, I think there should be some preliminary questions, perhaps, to show his competency to testify to value.

Mr. Wright: He said he made an investigation to determine the value, which, of course, was part of his duties as executor.

The Court: Ask what if any investigation he made.

Q. What if any investigation did you make to determine what the property was worth?

[fol. 2107] A. We took into consideration the assessed value for one thing, and took into consideration the cost, as we understood it to be and amount of mortgages that were on it. Those are various measures we used.

Q. What did you understand the cost to be?

Mr. McClennen: That is objected to.

The Court: Depending on when it was purchased. This was back in 1925.

Mr. Wright: That was when it was built, I believe.

The Court: The same condition—you mean its original cost?

The Witness: That is what I had in mind, yes.

The Court: That is some 15 years or some 9 years before this. You know something of the values of property in that locality?

The Witness: I wouldn't consider myself a judge, no, sir, but I would consider Mr. Robson, who was also an executor quite competent to determine the value of the property.

The Court: Is he here?

The Witness: No, he was a real estate man.

The Court: You and he made inquiries at that time of this rejected offer?

The Witness: We tried to put a valuation on all of the estate property. We thought that was our duty as ex-

[fol. 2108] ecutors, to have some idea of the value of this property.

The Court: Was it appraised?

The Witness: Yes, sir.

The Court: By whom?

The Witness: Mr. Remick, Lockport, and Mr. Howard Moyer, Lockport.

The Court: Appraised as of this time?

The Witness: Yes, sir.

By Mr. Wright:

Q. Do you know what that appraised value was?

Mr. McClennen: Just a moment, that I object to, if your Honor please.

The Court: Sustained.

Q. What was the value that you and Mr. Robson placed upon the property at that time?

Mr. McClennen: That is objected to, if your Honor please. This objection is more extensive than just this witness' qualification, which he does not profess. It appears that these executors wanted to sell this property and that this interview took place and that an offer was made and that they rejected it, and that thus far has ended that episode. It makes no difference what the property was [fol. 2109] on that showing, I submit.

The Court: The competency may depend on something they did. The proof may show they were compelled or forced in the circumstances to act and set a price much less than its value, and that might be material.

Mr. McClennen: What these executors put on it as a value is of no consequence.

The Court: That is another objection. I don't know that that is material, if he is not competent to judge value. The objection is sustained unless he is shown qualified to appraise it.

By Mr. Wright:

Q. After this offer, marked Exhibit 688 for identification, was rejected, did you hear anything further from Mr. Schine or Mr. May?

A. Mr. Schine had a conversation with Mr. Robson on June 14th, 1935 of which I have a memorandum.

Q. Were you present then?

A. No, sir.

Q. When was that memorandum of yours prepared?
A. June 14th.
Q. By you?
A. No, by Mr. Robson.
Q. Mr. Robson gave the memorandum to you?
A. He put it in our records.
[fol. 2110] Q. Could I see it, please?
A. Yes (handing paper to Counsel).

Mr. Wright: I will ask to have that given the next exhibit number for identification, 689.

(The pencil memorandum referred to was marked as Plaintiff's Exhibit 689 for identification.)

Q. You think, now that you have looked at the memorandum, Exhibit 689 for identification, that this offer, Exhibit 688, was submitted after June 14th?
A. Yes, sir.
Q. That is on or about the date that is on the offer there?
A. I believe so.
Q. The offer was then rejected?
A. Yes, sir.
Q. And subsequent to the rejection of the offer did you hear anything further from Mr. Schine or Mr. May?
A. I believe not.
Q. Not at any time?
A. Not until the time of the sale later.
Q. What time do you refer to as the time of sale?
A. The sale was held on April 20, 1936.
Q. That was an auction sale, was it?
A. A public auction sale.
Q. You had publicly advertised it?
A. Yes, sir.
[fol. 2111] Q. Immediately prior to the sale did you receive any communications from Mr. Schine or Mr. May?
A. I have no memorandum of them. There may have been conversations with our attorney, which I wouldn't know about.
Q. You don't know what was said?
A. No.
Q. This sale was held where?
A. In Mr. Fogle's office in Lockport.
Q. That was on what date?
A. On April 20, 1936.

Q. Do you recall who else was present there besides yourself?

A. Mr. Warner Thompson, Mr. Robson, Mr. Fogle, Mr. Schine, Mr. Osborne, and Mr. May, I think.

Q. Was Mr. Dipson there?

A. I believe he was, but I haven't a list of the names.

Q. The interest of the Estate in the Palace Theatre was sold on that day, wasn't it, at auction?

A. Yes, sir.

Q. To whom?

A. To Mr. Osborne.

Q. What was the price?

A. The final price was, cash, $37,600, the buyer assumed the first mortgage of $90,000, he assumed operating losses [fol. 2112] of $8,902.37, and he assumed advances for interest and taxes of $13,700.20, and interest on various items of $1,225.22, making a total of $151,427.79.

Q. The actual consideration, I take it, was that amount which you have mentioned, less the amount of the mortgage?

Mr. McClennen: Just a moment. He has stated what the consideration was.

Mr. Wright: I mean what was received net, the net receipts of the estate——

A. Was $37,600.

Mr. McClennen: The objection I make, your Honor, is that I understand the whole was the consideration. If he wanted to know how much cash was paid there would have been no objection to the question.

The Court: His testimony, as I understand it, was $37,600 was paid in cash and these debts were assumed as part of the purchase price.

The Witness: That is right.

By Mr. Wright:

Q. What was sold was the same property or interest that is described in this offer marked Exhibit 688?

Mr. McClennen: Just a n ute. The sale papers would show that more accurately, as was a sale. It must have [fol. 2113] been committed to writing, and he is really being asked for the contents of that writing.

The Court: I think he can state what was sold.

Mr. McClennen: The question asked was whether what was sold was the same thing included in this offer.

The Court: Objection sustained to the question in that form. He may state what was sold.

By Mr. Wright:

Q. Just state what was sold, if you can.

A. I think I have the advertisement of the sale here, which would tell that (handing newspaper clipping to witness).

Q. This notice of public sale you have produced, where was that published?

A. That was published in the local papers in Lockport.

Mr. Wright: I will ask to have this notice of sale marked as Exhibit 690 for identification.

(The newspaper notice of sale referred to was marked as Plaintiff's Exhibit 690 for identification.)

Q. And is the property that was sold on April 20th the property that was described in this notice marked Exhibit 690 for identification?

A. Yes, sir.

Q. Who were the bidders at the sale?

A. Mr. Osborne and Mr. Schine.

[fol. 2114] Q. Were there any other bidders?

A. No, sir.

Mr. Wright: I want to offer in evidence Exhibits 688 and 690 for identification. I offer both of those in evidence.

Mr. Rogers: Subject to the general objection that we have had to all, that it is purely a local transaction, no interstate commerce involved, and no violation of the Sherman Act involved.

The Court: Overruled.

(The agreement of June 17, 1935, previously marked as Plaintiff's for iden. Exhibit 688 was received in evidence.)

(The newspaper notice of sale, previously marked as Plaintiff's Exhibit 690 for identification was received in evidence.)

The Witness: The sale was finally concluded and we were given a release.

The Court: What do you mean that you were given a release? You said you were given a release.

The Witness: Memorandum of agreement. On the 20th day of April, 1936, and it follows here with many pages, and this was signed by all of us.

[fol. 2115] The Court: The sale was in April?

The Witness: This is dated—finally signed on the 7th of May.

By Mr. Wright:

Q. Is that the date the sale was completed?

A. I think that is the day when all the papers were finally passed. Perhaps you could tell quicker than I can.

Q. This, I believe, relates to another matter, does it not? This document you have just handed me is a release that was obtained from the Reliance Theatres Corporation in connection with the liquidation of their lease; is that right?

A. I haven't read it.

Mr. Wright: I will have it marked for identification.

The Court: The sale included the lease, then?

The Witness: Yes, sir.

The Court: The sale includes the rights under the lease which you had?

The Witness: Including all rights which we had, all stock that we had, all interest that we had in the theatre.

(The release, dated April 20, 1936, referred to was marked as Plaintiff's Exhibit 691 for identification.)

[fol. 2116] Q. This release, marked 691 for identification, then was executed on the date it bears there, May 7th?

A. Yes, sir.

Q. What is this attachment here described as "Final Report"?

Mr. McClennen: Just a moment. I submit that there should not be any interrogation as to the contents of this exhibit until it is in evidence.

The Court: He has corrected that now. He asks now what is the subject matter of the paper, I suppose.

Mr. McClennen: If your Honor please, all it means, perhaps——

Mr. Wright: I am trying to find out everything that is in it.

The Court: The proof of signature, I suppose, would be sufficient to make the document competent.

[fol. 2117] Q. I asked what this paper is that is attached to Exhibit No. 691 for identification that is entitled "Final Report"?

A. It is a report of the sale transaction made by Mr. Robson.

Q. That states——

A. That states the sale price.

Mr. McClennen: Just a moment.

The Court: No.

Mr. McClennen: If that paper is important it should be in. If it isn't, its contents should not be stated.

The Court: You can't give the contents.

Mr. Wright: I offer it.

The Court: Who was Mr. Osborne?

The Witness: Mr. Osborne was Mr. Dipson's right-hand man, as I understand it, Vice President of one of his companies.

The Court: I don't recall that he was referred to here; Mr. Dipson.

Mr. Wright: He was referred to yesterday by Mr. Dickinson.

The Court: He is the same man, the same individual?

Mr. Wright: Yes.

The Court: I do not see the materiality of this, Mr. [fol. 2118] Wright.

Mr. Wright: It merely fixes the date the transaction was completed. That is all I offered it for.

Mr. Rogers: Let's get the date if that is all.

Mr. McClennen: No objection.

Mr. Wright:

Q. As I understood your testimony, Mr. White, this May 20th, 1936 date was the date on which the sale of the theatre property was completed?

A. On the 20th.

The Court: Of May?

The Witness: Pardon me, I believe that is the final paper of the sale. The papers were all passed.

Q. The date on which that occurred was May 20th, 1936?

A. Yes, sir.

(Thereupon the document previously marked for identification as Plaintiff's Exhibit No. 691, is received in evidence.)

Mr. Rogers: There will be no cross-examination.
Mr. Wright: That is all.

[fol. 2119] Warner F. Thompson, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Thompson?
A. What is that?
Q. Where do you live?
A. Lockport, New York.
Q. What is your occupation?
A. I am an attorney.
Q. How long have you been so engaged?
A. 15 years.
Q. Did you represent Mr. Dipson and Mr. Osborne in connection with the acquisition of the Palace Theatre in May, 1936?
A. I did.
Q. Do you recall the—did you also represent them in connection with the transfer of the theatre to the Schine interests?
A. I did.
Q. Can you recall when the latter transfer occurred?
A. Well, the work in connection with the transaction oc-[fol. 2120] curred in the summer of 1936. The exact dates are referred to in my memorandum here, but I can't recollect them off-hand.
Q. Well, do you recall when Schine took over the operation of the theatre?
A. I do not have the exact date, except there is a memorandum here as to when I turned over the minute books of Reliance Theatres, and the stock book of Reliance Theatres. That was on October 9th. The operation took place before that. That was the day I delivered the final papers, I mean, the final documents connected with it. The operation had taken place before that.
Q. Do you know how long before that it was that Schine took over the management of the theatre?

A. According to my memorandum, the last memorandum I have of the transaction, it was the latter part of July, so that the actual transfer of possession and operation took place between the first of August and 9th of October, whether it was August or September, I can't recollect.

Q. I will show you this document entitled "Referee's Deed," and ask you if you can tell us what that is?

A. Well, it is a referee's deed of a mortgage foreclosure proceeding.

Q. The property that it relates to, do you know from looking at it whether or not it refers to the Palace Theatre, [fol. 2121] Lockport?

Mr. McClennen: Wouldn't the deed say in its terms?

Mr. Wright: It merely describes, I think, the property in terms of lot numbers and street address.

The Witness: This refers to the Palace Theatre.

Mr. Wright: I will have this one you have just identified as the Referee's Deed, marked for identification as Exhibit No. 692.

(Thereupon Referee's Deed, referred to, was marked as Plaintiff's Exhibit No. 692 for identification.)

Q. This indenture of October 10th, 1937——

A. 1936.

Q. From Mr. Osborne to Lock City Theatres, Inc., refers to the same property?

A. This is 1936. I believe you said 1937.

Q. 1936, yes, my error.

A. Yes, this is the same property.

Mr. Wright: I will ask to have that marked for identification as Exhibit No. 693.

(Thereupon Indenture dated October 10th, 1936, from Mr. Osborne to Lock City Theatres, Inc., referred to was marked as Plaintiff's Exhibit No. 693 for identification.)

Q. Mr. Thompson, had you also been representing the [fol. 2122] Reliance Theatre Corporation during the period it was operating the Palace Theatre?

A. Yes, sir.

Q. And in that connection did you have any conversations with any representatives of the Schines?

A. Yes, sir.

Q. With whom?

A. With Mr. Willard McKay, Mr. Schine's attorney.

Q. And when was that?

A. It was on June 16th, 1936.

Q. Where did it occur?

A. Occurred in the City of New York in Mr. McKay's office.

Q. What was said there, was there any one else present, I ask you first, if there was any one else present besides you and Mr. McKay?

A. There was myself and Mr. McKay and possibly my father, Mr. George F. Thompson; I am not sure whether he was present or not, he might have been.

Q. What was said then?

Mr. McClennen: That we object to, if your Honor please. I take it, of course, that the Mr. McKay referred to is one of counsel in this case, but it doesn't at all follow that this conversation should be admissible. Of course, I don't know [fol. 2123] what is in it. I raise the objection and press it.

Mr. Wright: The answer to Plaintiff's interrogatory 3 discloses Willard S. McKay, New York City, as a director and Vice President. It isn't clear that the periods that refers to as being which——

Mr. McClennen: Well, it appears to me that he was a director from August 31, 1931 to January 19th, 1932, and that he was Vice President from January 17th, 1938, intermittently to the date of the answer.

Mr. Wright: Well, is the objection based on the fact that it is asserted that Mr. McKay was not representing Schine at this time?

Mr. McClennen: It is based upon the fact that it appears by your evidence that he was not an officer or director at the time in question.

Mr. Wright: I submit the mere fact he was not an officer or director wouldn't prevent the conversation being competent, if, as Mr. Thompson stated, he was representing him as attorney.

Mr. McClennen: You asked me to state what the objection was and I am telling you what the objection is.

Mr. Wright: And I say it isn't well taken.

Mr. McClennen: I assume so, and press it.

[fol. 2124] The Court: You will have to show his authority.

By Mr. Wright:

Q. Had you had any dealings with Mr. McKay?

A. I don't believe I had, but I called him on the telephone as a result of a telephone call I had from Mr. Dipson, asking me to, as a result of a conversation he had with Mr. Schine, as he told me.

Mr. McClennen: May this go out?

The Court: Strike it out. The question is whether you had any prior dealings.

Mr. Wright: I will ask him now what the circumstances were which brought you to Mr. McKay's office on that day, we can take that.

The Court: He said it was based on a conversation with Mr. Dipson.

The Witness: I called Mr. McKay on the telephone and told him I had been requested by my client, Mr. Dipson, to ask for a conference with Mr. McKay. He replied he would be willing to see me and fixed the hour at 2:30 in the afternoon at his office on Sixth Avenue. I then went to his office, and had a conversation.

Mr. McClennen: Just a moment, that is the conversation [fol. 2125] that is now under consideration by the Court on my objection. Please don't state it until the Court has ruled.

The Court: Do you think a sufficient foundation has been laid for the admission of Mr. Thompson's conversation?

Mr. Wright: I think so, your Honor. I don't see that there is any——

The Court: There is nothing here so far to show Mr. McKay's relations to the company. I say "so far," I mean at that time.

Mr. Wright: Well, Mr. McKay's name appears in several of these companies, but as to the particular—the answer says as to Schine-Lexington Corporation, one of the defendants here, Mr. Willard McKay was Vice President from October 1, 1936 to November 4th, 1937. He appears here as——

The Court: It shows he was a director?

Mr. Wright: As to Schine-Lexington Corporation, he appears as Vice President only from October 1, 1936 to November 4th, 1937, and from November 21, 1938 to November 7th, 1940. He also appears here as Director and Vice

President of Chesapeake Theatres Corporation from April [fol. 2126] 26th, 1938, to December 30th, or, a director from April 26th, 1938, to December 30th, 1938, and Vice President from April 26th, 1938 to date. He also appears here, I believe, as Vice President of Schine Circuit, Inc., from August 27th, 1938 at intermittent periods to date. I believe those are the only defendant corporations in connection with which his name appears in the interrogatories.

The Court: This conversation was in June, 1936?

The Witness: June 16th, 1936.

The Court: Well, if it is proposed to connect this with his position with the company, I will receive it.

Mr. Wright: I will have Mr. Thompson step down and call Mr. McKay as an adverse witness now.

The Court: I will receive it subject to showing his authority.

Mr. McClennen: I submit that such a conversation as this is not admissible.

The Court: It depends on the extent of the individual's authority in the conversation.

Mr. McClennen: Yes, but——

The Court: I know, but until that authority is shown, it [fol. 2127] has no probative force.

Mr. Wright: Well, if the Court please, I will ask Mr. Thompson to step down and I will call Mr. McKay.

Willard S. McKay, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Now, Mr. McKay, you are an attorney in New York?

A. Yes.

Q. And you also hold office in these various defendant corporations here?

A. I have held office at some time.

Q. Do you now?

A. My recollection is at the present time I hold no office.

Q. With any of the defendant corporations?

A. That is my best recollection.

Q. Now, calling your attention to the year 1936, what, if any, connection did you have with Mr. Myer Schine or Schine Circuit, then?

A. I performed legal services for them from time to time.

[fol. 2128] Q. Throughout that year?

A. I believe so. I don't recall any specific services I performed during 1936, but I presume I performed services during the year.

[fol. 2129] Q. And do you recall performing any with reference to the Palace Theatre at Lockport?

A. Not at this moment. I keep a diary, and if I did perform any legal services that would appear in the diary.

Q. You couldn't say whether you did or did not now?

A. No.

Q. But you know you were representing Mr. Schine during that period?

A. I know that I was performing legal services for him during that period.

The Court: You have not inquired about this particular occasion.

Mr. Wright: I will recall him, then.

The Court: He said he performed services at different times that year.

By Mr. Wright:

Q. Can you refer to your memorandum, Mr. McKay, and then supply us with that information?

A. It is in New York.

The Court: Why do you not ask him if he recalls his conversation with Mr. Thompson?

Mr. McKay: Not without reference to my diary. If there was a conversation there will be a note of it in my diary and that will refresh my recollection, but presently I do not [fol. 2130] recall the conversation.

The Court: You are going to undertake to produce your diary for us?

Mr. McKay: I will refer to it anyway.

Mr. Wright: I submit that is as far as we can go at the present time, your Honor.

The Court: Yes.

Mr. Wright: I think we ought to have the conversation, subject to it being stricken if it should appear that Mr.

McKay was not at that time representing the Schine interests.

The Court: I will let him state, subject to it being stricken if the proper connection is not made.

WARNER F. THOMPSON resumed the stand in behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination (Continued).

By Mr. Wright:

Q. Will you state what the conversation was?

Mr. McClennen: We have our objection.

The Court: Yes.

A. I told Mr. McKay that we had had a telephone conver-
[fol. 2131] sation with Mr. Dipson, that he had notified us that he had had discussions with Mr. Schine in reference to making an arrangement between them for the theatres in Lockport, that we understood—we had been told that Schine had offered $200,000 for the theatre, which had been rejected; that they had thereafter discussed a pooling arrangement whereby all theatres in Lockport would be combined; the Hi-Art would be closed; rent would be paid to Dipson for the Palace Theatre and to Schine for the Rialto, in an amount to be agreed upon; that thereafter the profits each year, up to a sum of approximately $50,000, should be divided 65% to Schine, 35% to Dipson, and above that 50-50. That Schine should have the management of all theatres and Dipson and Schine each to have 50% of the stock of the new corporation. Mr. McKay stated first that of course they were not at all afraid of this action which the Reliance Theatres had previously brought, that in their opinion our chances of success were nil. McKay stated that Schine had two theatres in Lockport, and that he absolutely required the number of pictures that he bought; that he actually used, played them, and paid for them; that he did not believe any court would interfere with that arrangement. He said, however, that it would be very
[fol. 2132] expensive to defend the suit; that also, under the present conditions in Lockport, neither Schine nor

Dipson were able to make as much money as the situation warranted. That if they got together both would make increased profits in the future. That for the purpose of settling the suit and increasing the profits in Lockport they were willing to enter into a pooling arrangement, whereby the Hi-Art would be closed, the Rialto and Palace Theatres operated, management thereof to be exclusively in Schine's hands, because of his superior buying position; that rental was to be paid for both the Palace and Rialto Theatres, respectively.

No definite basis of rental was discussed, except that it was suggested that rental should be based upon a fixed return upon the investment in each theatre.

Mr. McKay further said that he understood from Schine that Dipson had agreed that Schine should have 65% of the profits and Dipson 35% after payment of expenses and rental, and the rental of the Hi-Art Theatre, which was to be closed.

He further stated that Dipson insisted upon 50% of the stock in the new corporation, but they did not trust Dipson [fol. 2133] to any extent whatsoever. Therefore they felt it inadvisable to allow a 50-50 stock division, for the reason that any time Dipson might cause a dissolution of the new corporation, which if it occurred after the better pictures were placed and played in the Palace by Schine's management, might be used by Dipson against Schine in a subsequent anti-trust suit, in the event pictures were withdrawn from the Palace. That they could not allow this to happen; that if they went into the arrangement they wanted it permanent for at least twenty years. That he did not believe that an agreement on our part not to dissolve would be binding. That therefore, inasmuch as Schine was to have the management and 65% of the profits, it would necessarily follow that he should have at least a majority of the stock.

That if Dipson actually physically desired 50% of the stock that could be handled by a voting trust arrangement for all the stock, whereby Schine had the appointment of two of three voting trustees; that if these conditions were satisfactory the deal could be closed in short order.

I told him that we would consider the matter, advise with Mr. Dipson, and notify him of our reply. On the 18th——

[fol. 2134] Mr. McClennen: Just a moment, before you

get to another date. Now that your Honor has heard the conversation I move that it be stricken out.

The Court: Motion denied for the present.

Q. Was that all the conversation on that day?

A. According to my recollection.

Q. Then you saw him again?

A. I talked to him on the telephone subsequently.

Q. When was that?

A. June 18th.

Q. 1936?

A. 1936.

Q. What was the conversation then?

Mr. McClennen: That conversation is objected to.

The Court: Same ruling.

A. I talked to Mr. McKay in New York on the telephone and advised him Schine's offer was rejected for the reason that Dipson, under the arrangement, would be only a minority stockholder. Mr. McKay replied that he did not believe any other arrangement would be satisfactory, but that he would inform Mr. Schine of our decision, who was then in New York.

Q. Was anything else said?

A. No, that is all, according to my recollection.

Q. Did you have any further conversation with him?

[fol. 2135] A. I did not.

Q. What was this suit that you referred to in the conversation?

A. This was a civil——

Mr. McClennen: That is objected to, if your Honor please. A description by the witness of a suit.

The Court: How is it material?

Mr. Wright: Just for explanatory purposes, to know what they were talking about.

Q. In the suit you referred to in the conversation were you representing the plaintiff, or who was the plaintiff?

A. I was representing the plaintiff and the plaintiff was Reliance Theatres, Inc.

Q. That was a treble damage action under the Clayton Act?

Mr. McClennen: Just a moment. I object.

The Court: Sustained.

Q. Who were the defendants?

A. There were numerous defendants. I mean there were the various Schine corporations——

Mr. McClennen: Just a moment. That is objected to. The record should be shown.

The Court: Sustained. I think it is sufficiently answered by the evidence given in regard to the conversation with Mr. McKay in New York.

Q. Was that suit pending in this court?

[fol. 2136] A. Yes, sir.

Q. Who was representing the defendants?

Mr. McClennen: That I object to.

The Court: Sustained.

Mr. Wright: If the Court please, I think that is material on the question of connecting the conversation with Mr. McKay.

The Court: Unless you show that Mr. McKay was acting on a retainer it would not be competent. The fact that he appeared in one action would not be proof of his authority to appear in another action.

Mr. Wright: I take it it was in reference to this particular suit.

The Court: He has already said that. You are asking now for the name of the attorney, for the purpose, I assume of connecting up the authority of Mr. McKay to hold that conversation.

Mr. Wright: I should think that would be additional evidence of authority.

The Court: I do not think so. Objection sustained.

Q. Then did you have anything to do with the final transfer that occurred of the Dipson interest to Schine?

A. Yes, sir.

[fol. 2137] Mr. Rogers: One moment. Well, go ahead.

Q. You haven't been able to fix the date of that more accurately than you have already stated, during the summer?

A. I have had some memorandum there of the various days that I spent in July in connection with that transaction. Apparently it is not the final date.

The Court: You said he went into operation some time between August and October?

The Witness: That is right.

The Court: You don't know just the final date that the deal was closed?

The Witness: No, I don't seem to have my memorandum on that particular phase of the transaction. There were transfers that took place here. I mean the whole thing was done, but I don't happen to have a memorandum in my files to show when that was.

By Mr. Wright:

Q. Do you know whether or not any pooling arrangement, such as was discussed, was ultimately made?

A. I do not.

Mr. Wright: That is all.

Mr. Rogers: No cross-examination.

(Short recess taken.)

[fol. 2138] Mr. Wright: If the Court please, at this time we would like to offer in evidence excerpts from the exhibit that has been identified as 654, that is, the file of the Lockport newspapers. What I wanted to read were the admission prices wherever they appear of the three theatres. The first——

Mr. McClennen: I suggest that the page be put in, because on the very same pages are some that we are interested in also.

Mr. Wright: We will be glad to read in at the same time any prices that you are interested in. We have to give the book back to the paper, and we can't tear any pages out of it.

The Court: Read the part you want and let the other side read it also.

Mr. McClennen: It occurred to me if we just had a photostat made of the ones that are wanted, it might be quicker. If your Honor thinks it is better to read from the book, all right.

The Court: It isn't a matter of the pictures.

Mr. Wright: Most of the material on the page wouldn't be relevant. All I want to do is read the admission price figures.

[fol. 2139] Mr. McClennen: Then as you read from your page may I also read from the page the things that we want?

The Court: Surely.

Mr. Wright: The issue of October 9th, 1933, carries the announcement of the proposed opening of the Hi-Art.

The Court: October when?

Mr. Wright: October 19th, 1933, states, the ad for the Hi-Art states "Gala Opening, Saturday, Double-feature program, redecorated, reseated, remodeled, recarpeted, latest sound equipment installed, matinee 15 cents, nights and Sundays 20 cents, kiddies 10 cents always." There are, I believe, no admission prices stated for the Rialto, although an ad appears on the same page. The Palace admission prices stated on the same page are stated as 10 cents, 20 cents and 25 cents.

The Court: You mean—ten cents for matinee?

Mr. Wright: I mean, as it says here, it simply says "Our prices 10, 20 and 25 cents". It doesn't appear——

The Court: All right.

Mr. McClennen: That advertisement also says "On the [fol. 2140] stage five big-time vaudeville acts, featuring Touche and his Victor Recording Orchestra, and on the screen 'Easy Millions' and also 'Country Store Nights', twenty-five baskets IMCO groceries will be awarded."

Mr. Wright: I wanted to add the Rialto ad also shows two features, but doesn't state admission prices. The ads of Friday evening, October 20th contains ads for the Rialto and Hi-Art and the Hi-Art admission prices are stated, Kiddies 10 cents always, matinee 15 cents, nights 20 cents, two features are advertised and two are also advertised for the Rialto with no admission prices stated. There doesn't appear to be a Palace ad on that page.

The issue of Monday evening, October 23rd, contains an ad for the Rialto showing two features with no admission prices stated and two pictures at the Hi-Art with matinee 15 cents, children 10 cents, nights 20 cents. The prices stated for the Palace ad are matinee 20 cents, evening 20 and 25 cents.

Mr. McClennen: The features are "Hello Harlem".

Mr. Wright: That is a stage show, I believe.

[fol. 2141] Mr. McClennen: The stage show is "Hello Harlem". There is a stage show advertised, and there is a description of it.

The Court: At the Palace or Rialto?

Mr. McClennen: This is at the Palace, and this Palace ad on October 23rd, has a MGM announcement.

Mr. Wright: I think it appears as a comedy. The feature was Lionel Atwell and the Sphinx. The reference to MGM was a comedy.

Mr. McClennen: This October 20th has——

The Court: The 20th, you were talking about the 23rd.

Mr. Rogers: We are going back to the 20th for a moment.

Mr. McClennen: October 20th, 1933, there is this in large print "The Merchants of West Main Street Welcome the Opening of the Newly Decorated and Thoroughly Remodeled Hi-Art Theatre, Saturday, October 21st, Under Schine Management, Assuring Lockport another High-class Program for Theatre-goers. Come Down. The Latest Releases from the Greatest Motion Picture Studios."

Mr. Wright. The issue of Tuesday Evening, October 24th, shows two features at the Hi-Art; matinee 15 cents and nights 20 cents. Two features at the Rialto with ad-
[fol. 2142] mission prices unstated. The Palace, matinee 10 cents and 20 cents; evening 10, 20 and 25.

Mr. McClennen: This has for the Palace also a stage show "Hello Harlem" and the picture is "Night World". Here is a slip, may we put that in, in the order of that——

Mr. Wright: Yes, what date is it supposed to be?

Mr. McClennen: October, 1933.

Mr. Wright: Here is September Evening, October 28th, Saturday Evening, October 28th, the Hi-Art shows "Gold Diggers of 1933", matinee 15 cents, nights 20 cents. The Rialto shows "Too Much Harmony", matinee 2 P.M. The only price is, continuous show Sunday, 2 to 11 P.M. The only price listed is 25 cents. The Palace shows prices of 10 cents, 20 cents and 25 cents.

Mr. McClennen: That Palace advertisement also has "Hello Harlem Review", on the screen "Traveling Husbands" and "Our Gang in Mush and Milk" and tonight, midnight, "Scandals of ——

Mr. Wright: You are reading the concluding program, and the first thing you read is the show. Now, you are reading the next show.

Mr. McClennen: "Tonight, 11:30 P.M., midnight, 'Scan-
[fol. 2143] dals of 1933' ". Then there is the announcement of what starts tomorrow. On October 27th, 1933, there is the announcement "For all kiddies, charge at the Palace. At the Palace all kiddies are 5 cents".

Mr. Wright: That is from 1 to 3 P.M.

Mr. McClennen: That is from 1 to 3 P.M. At the head "Special Tonight Only, Beau Night. Ladies will be admitted absolutely free if accompanied by their beaus. Come One, Come All."

Mr. Wright: The other prices stated there are 10, 20 and 25 cents, and in the same issue the Rialto is playing "Saturday's Millions" with the statement "Saturday Matinee Only Free Footballs", and also a second feature "Flaming Gold". The Hi-Art is playing "Gold Diggers of 1933" at 15 cents matinees, nights 20 cents.

In the issue of Friday Evening, November 3rd, 1933, the Hi-Art shows two features; matinee 15 cents, kids a dime, evenings and Sundays 20 cents and kids a dime. Rialto has two features, and is also advertising, starting at midnight, 11:30, two features. For the succeeding program [fol. 2144] no admission price, and has a notice "Watch the Air for Free Passes to 'Night Flight', Saturday noon".

Mr. McClennen: The Palace has a display "Attention Kiddies, Saturday Only, from 1:30 to 2:30, special matinee 5 cents". Then down below it gives a "Katherine Hepburn picture and a stage show and prices 10, 20 and 25 cents."

Mr. Wright: The name of the picture is "Christopher Straw".

Mr. McClennen: On November 7th, there is for the Palace, matinee 20 cents, evenings 20 cents and 25 cents, children 10 cents, and on the stage "March Musical Vanities" and "Girls Will Be Girls". Then on the screen "Katherine Hepburn" in the R.K.O. Picture "Christopher Straw', and a gift night, valuable gifts will be awarded."

Mr. Wright: At the Hi-Art the two features are being shown, 15 cents matinee, 20 cents evenings. At the Rialto showing two features with no admission prices stated.

Mr. McClennen: I see I have run by one of October 13th, The Palace reads then at the top "Palace Theatre tonight [fol. 2145] from 7:30 to 8:30 P.M., Bargain Hour, Adults 15 cents all seats," and then below the picture, "The Big Brain" and a stage show and a big-time vaudeville road show, "Varieties of 1933", and a double feature.

Mr. Wright: The two features, the second feature is called "The Savage Girl" and the other one you named, "The Big Brain".

At the Rialto there were two features and admission prices unstated, and that was before the Hi-Art opened, I think. There is an ad for the Hi-Art which simply says, "Starting Saturday Night, 11:30, Two Big Features."

Mr. McClennen: October 21st.

Mr. Wright: Yes.

Mr. McClennen: On November 10th, 1933, under the Palace, "Tonight, Friday and Saturday, prices 10 cents, 20 cents; 10 cents, 25 cents".

Mr. Wright: The first you had is for matinee and the second for evenings.

Mr. McClennen: 10 and 20 for matinee and 10 and 25 for evenings, and on the stage "The Complete Version of the Rosary", and on the screen, "Preston Foster, Peggy [fol. 2146] Shannon, in a fine picture, also Harry Langdon, comedy cartoons", and under "Hey, Kiddies, Special Matinee, Saturday only, from 1:30 to 2:30, 5 cents only."

Mr. Wright: And at the Hi-Art in the same issue, matinee, except Sunday, prices 15 cents; evenings 20 cents for two features. The Rialto is showing two features with no admission prices listed.

[fol. 2147] On November 18, 1933, "RKO hit on the screen, "Junior Durkin," and all-star cast in RKO hit "Manhunt."

Mr. Wright: In the same issue the Hi-Art advertises two pictures, matinee, 15 cents, evenings and Sundays, 20 cents, bargain day, Saturday and Sunday, six kids for 25 cents.

The Rialto advertises "Footlights Parade," without any statement of admission prices.

In the Tuesday evening issue, November 28, 1933, the Rialto was showing a picture called "The Bowery," with free chickens, ducks and turkeys Wednesday night. Two features for Thanksgiving. The Hi-Art is showing two features, at matinee 15 cents, evening 20 cents, offering six free turkey dinners to be given away from the stage Wednesday night at 9 P. M.

Mr. McClennen: Going back to November 25, 1933, the Palace has an extensive advertisement, and a bargain hour tonight from 6 to 7 P. M., adults 15 cents, children 5 cents.

Mr. Wright: The remaining Palace prices are 10 cents, 20 [fol. 2148] cents, 30 cents. The Hi-Art lists two features, matinees, except Sunday, 15 cents, evenings 20 cents.

The Rialto shows "The Bowery," with no admission prices stated.

Now I will recall Mr. Rose, or I think you can just make the statement for the record. All he wanted to do was to state the results of his telephone call for permission to release those exhibits for inspection.

Mr. Rose: I am authorized to state for the record that the limitation imposed on those answers to interrogatories which were served by Columbia is withdrawn and they may be used in any way that answers to interrogatories may be used.

THOMAS F. MURRAY, recalled on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination.

By Mr. Wright:

Q. You are the same Mr. Murray who testified here the other day?

[fol. 2149] A. Yes, sir.

Q. And have you brought with you the subpoenaes duces tecum that were served on Universal Film Exchanges, Inc.?

A. Yes, sir.

Q. This paper here that you have in your hand is the description of documents contained in the subpoena that was returnable on May 19, 1944?

A. Yes, sir.

Mr. Wright: I will ask to have that list marked with the next exhibit number for identification.

(Description of documents in subpoena returnable May 19, 1944, referred to was marked as Plaintiff's Exhibit 694 for identification.)

Mr. Wright: The exhibit that has been marked as Exhibit 694 for identification is simply the part of the subpoena that describes the documents that are called for for production.

By Mr. Wright:

Q. You have the documents here that have been produced in response to paragraph 2 of this Exhibit 694 for identification?

A. Yes, sir.

Q. And they are in this folder that has been marked paragraph 2, May 19th subpoena?.

A. Yes, sir.

[fol. 2150] Q. And you have the documents produced in response to paragraph 3 of this subpoena in this folder marked paragraph 3?

A. Yes, sir.

Q. You have the documents produced in reference to paragraph 4 of that subpoena in this folder marked paragraph 4?

A. Yes, sir.

Q. Do you have the documents produced in reference to paragraph 5 of the subpoena in this folder marked paragraph 5?

A. Yes, sir.

Q. Do you have the documents produced in response to paragraph 6 of that subpoena in this folder marked paragraph 6?

A. Yes, sir.

Q. Do you have the documents produced in response to paragraph 7 of that subpoena in this folder marked paragraph 7?

A. Yes, sir.

Q. Do you have the documents produced in response to paragraph 8 of that subpoena in the folder marked paragraph 8?

A. Yes, sir.

Q. And those produced in response to paragraph 10 of the [fol. 2151] subpoena are in this folder marked paragraph 10?

A. Yes, sir.

Q. Then you have the documents produced in response to paragraph 16 of that subpoena in this folder marked paragraph 16?

A. Yes, sir.

Mr. Wright: I will ask to have these nine folders that I just described marked as the next exhibits for identification in the order that I have just referred to them.

(The documents produced in response to paragraph 2 of Exhibit 694 for iden. in folder was marked as Plaintiff's Exhibit 695 for identification.)

(The folder containing documents produced in response to paragraph 3 was marked as Plaintiff's Exhibit 696 for identification.)

(The folder containing documents produced in response to paragraph 4 was marked as Plaintiff's Exhibit 697 for identification.)

(The folder containing documents produced in response to paragraph 5 was marked as Plaintiff's Exhibit 698 for identification.)

(The folder containing documents produced in response to paragraph 6 was marked as Plaintiff's Exhibit 699 for identification.)

[fol. 2152] (The folder containing documents produced in response to paragraph 7 was marked as Plaintiff's Exhibit 700 for identification.)

(The folder containing documents produced in response to paragraph 8 was marked as Plaintiff's Exhibit 701 for identification.)

(The folder containing documents produced in response to paragraph 10 was marked as Plaintiff's Exhibit 702 for identification.)

(The folder containing documents produced in response to paragraph 16 was marked as Plaintiff's Exhibit 703 for identification.)

Q. Calling your attention to paragraph 9 of this exhibit 694 for identification, where are the documents produced in response to that paragraph?

A. They are produced under paragraph 2.

Q. They are in the folder that was marked paragraph 2?

A. That is right.

Q. And where are the documents that were produced in response to paragraph 11 of this subpoena?

A. They are also in paragraph 2.

Q. The Universal Film Exchanges was served, was it not, with a subpoena returnable August 15, calling in paragraph 1 for all franchises and master agreements made between you and Schine Chain Theatres, Inc., the Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises, [fol. 2153] Schine Lexington Corporation, Belpik Theatres, Inc., or Chesapeake Theatres Corporation, for the exhibition of feature films released by you during one or more of the motion picture seasons of 1931-32 to 1940-41, inclusive?

A. Yes, sir.

Q. What have you produced in response to that paragraph?

A. We have made an exhaustive search of the films of the contract department and the legal department and were unable to find any such existing franchises.

Q. Did you note the period there, through 1940-41?

A. Yes, sir.

Q. As I recall, a franchise for the years 1938-1939 and 1940-1941 was produced here and identified by Schine.

A. Schine may have a copy of such a franchise but I was unable to locate it.

Q. You were unable to locate it in your files?

A. That is right.

Q. What have you produced in response to paragraph 3 of this same subpoena which calls for all printed schedules or feature motion picture films released by you during the period from August 31, 1931 to September 1, 1941?

A. That information was developed on an interrogatory that was served upon us, which we assembled the data and compiled it in this volume here in court (indicating).

[fol. 2154] Mr. Wright: Mark this with the next exhibit number for identification.

(The bound volume referred to was marked as Plaintiff's Exhibit 704 for identification.)

Q. Mr. Murray, can you tell us what that bound volume, marked 704 for identification, is, how and when it was prepared?

A. It was prepared in the early part of 1941, covering the years identified in the subpoena per situation per year.

Q. You mean in the interrogatories that were then served on Universal?

A. Per individual situation per year, accumulation at the final year in the interrogatory.

Q. The document was prepared under your supervision, was it?

A. Yes, sir.

Q. By "situation" you refer to each of the sections that has a tab headed with the town name?

A. Yes, sir.

Q. And for each of those towns which have a tab there

are then different colored sheets, each representing a motion picture season?

A. Yes, sir.

Q. The yellow is for the features released during the 1935-36 season?

[fol. 2155] A. Yes, sir.

The Court: Does that show to whom it was released on that page or some other page?

Mr. Wright: I am getting to that.

The Court: Go ahead.

Q. And the green is the features released for the 1936-37 season?

A. Yes, sir.

Q. And the light blue for 1937-1938?

A. Yes, sir.

Q. The pink for 1938-39?

A. Yes, sir.

Q. The white for 1939-1940?

A. Yes, sir.

Q. Then the first column down the left, that contains the titles of the features released during the season in question?

A. Yes, sir.

Q. And the next column is the cast of characters?

A. Yes, sir.

Q. And the next column is the national release date for each of them?

A. Yes, sir.

Q. Then the name which appears in the upper left-hand corner, the first name is that of the exchange out of which [fol. 2156] the town was served?

A. Yes, sir.

Q. And the next is the town?

A. Yes, sir.

Q. And then the theatres at which the pictures for that season played in the town are listed at the top of the page, are they?

A. Yes, sir.

Q. Are the dates at which the features appearing on the sheets played at those theatres also listed?

A. Yes, sir.

Q. They are in which column?

A. They are in this column here (indicating).

Q. The column headed "Dated"——.

A. 10-I and 14-A, which was that portion of the interrogatory.

Q. Which you were responding to?

A. Yes, sir.

Q. Then the next column shows the contracted rental?

A. Yes, sir.

Q. What does that mean?

A. That means the terms at which the contract was drawn and delivery was to be under.

Q. The next column shows increase or decrease in rental?

A. Yes, sir.

[fol. 2157] Q. And the next column headed "Actual rental received" shows exactly that; it is self-explanatory?

A. That is right.

The Court: You have not covered the last two columns?

Mr. Wright: This has other data, but the only data we were interested in was what I asked him about.

A. This is a column that pertains to each situation (indicating). This first column applies to the Strand and Rialto of Schine. This is the opposition, the Orpheum Theatre in Amsterdam, operated by Kranik, which information was called for under the interrogatory.

Q. First the name of the theatre appears and then the name of the operator and then the dates over here at the left are the dates of the contracts under which the pictures were played?

A. Yes, sir.

Q. And the names for "Distributor" and "Exhibitor" are the persons that signed for each party?

A. Negotiated. For the distributor——

Q. One for whoever negotiated them and the second list is who signed them; isn't that right?

A. Yes, sir.

Mr. Rogers: This shows the date it played in this town (indicating)?

The Witness: That is the date it played in this situation.

[fol. 2158] By Mr. Wright:

Q. The second column there, which is dated "Delivery of Prints," is that the date on which the first print was delivered to the exchange in that area?

A. Yes, sir.

Q. And the column headed "Branch Print Allotment," shows the number of prints allotted to that exchange at that time?

A. Yes, sir.

Mr. Wright: This was produced and filed under the same restriction as the Columbia material was furnished, that it would be held confidential, but as I understand it Universal is also willing to waive that restriction and it will be subject to your examination. Isn't that right, Mr. Murray?

A. Yes.

Mr. McClennen: If any one had enthusiasm enough to look at it where would he find it?

Mr. Wright: We will be glad to keep it down in our office on the fifth floor there. Any time we are there and we are not working on it you can certainly work on it.

By Mr. Wright:

Q. I was going to call your attention to certain abbrevia-
[fol. 2159] tions which appear in some of the columns, such as "Canc," that means cancelled, does it?

A. Yes, sir.

Q. I think there is an abbreviation that appears there, "Elim." That means eliminated?

A. It means that the subject was eliminated. Selective contract was sold in this situation. It did not include the entire year's product which granted the exhibitor the privilege of elimination, and these are the eliminated subjects.

Q. You mean an elimination means simply a picture was rejected, which the exhibitor had the privilege of playing but was not obligated to play; is that right?

A. Yes.

Q. And the cancellation is the cancellation of a picture he was obligated to play?

A. Yes, sir.

Q. The figures at the bottom are simply totals of the columns?

A. Each year has been cumulated and then the final year the total cumulation, 1934-5 to 1939-40.

Q. You have cumulated totals in each situation?

A. Yes, sir.

The Court: You spoke about the exhibitor being obligated
[fol. 2160] to show. Was he obligated to show, where he paid so much a picture, or is that at his option?

The Witness: We had a year's output of 50 pictures, of which he bought 26, and he would have the opportunity of eliminating 14 of the pictures.

The Court: I thought he was paying on a basis of so much per picture?

The Witness: He could, unless there was a qualification otherwise that it was to be eliminated from a certain bracket.

The Court: If he bought it he could do anything he wanted with it, if he paid so much a picture he could do anything he wanted with it?

[fol. 2161] Mr. Wright: If the Court please, when he just buys 26 pictures, it doesn't appear which ones he plays, and he eliminates, maybe, at the end of the season.

The Court: Yes, that might be.

Mr. Wright: All right.

Q. Take so far as the information you just described, appearing on here is concerned, is this tabulation that you had prepared the best record you have got of the facts that are set forth there?

A. It is the best and most accurate record that we have.

Mr. Rogers: Do you mind if I see that first page you showed, Mr. Murray? I was so far away.

Mr. Wright: It is at the back end.

(Page shown to Mr. Rogers.)

Mr. Rogers: That is all I wanted to see, thank you.

Mr. Wright: That is all, I think.

Q. Oh, Mr. Murray, I noticed there are only five seasons' releases covered and the subpoena called for 1931-32 to 1941-42; the releases for those other periods are contained in another answer to our interrogatories that you filed with the Court, are they?

A. I believe so, yes.

Mr. Wright: If it is agreeable with counsel, we will follow the same procedure as to those that we did with Columbia [fol. 2162] and have a copy of the list, as it appears in the court record, marked for identification as an exhibit.

The Court: It appears in the answer to interrogatories?

Mr. Wright: Yes.

Mr. McClennen: Just the title and release dates.

Mr. Wright: Just the title and release dates. I think they also have the cast on.

Mr. Rogers: The same as we did with Mr. Morgan.

Mr. Wright: The same as you did with Mr. Rose, who was the one that identified the Columbia answer.

Mr. Rogers: Are you reserving any number now or any part of it?

Mr. Wright: We can reserve one now, but it would be less confusing if we just marked it when we bring it in.

Mr. Rogers: All right.

Mr. Wright: That is all; we have Mr. McGrath who will give the same testimony for United Artists documents and interrogatory answers.

The Court: Will it be short?

Mr. Wright: I think so.

[fol. 2163] STEPHEN W. McGRATH a witness recalled by and on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. You are the same Mr. McGrath who testified here the other day?

A. Yes, sir.

Q. And the United Artists Corporation was served with this subpoena you have there in your hand, and does this document you just handed me contain a description of the license agreement called for by the subpoena on the United Artists Corporation, returnable May 19th?

A. Yes, sir.

Mr. Wright: I will ask to have that marked the next exhibit number for identification.

(Thereupon the document containing description of license agreement called for by subpoena on the United Artists Corporation, returnable May 19th, referred to, was marked as Plaintiff's Exhibit No. 705 for identification.)

Q. Have the documents respectively produced in response to Paragraphs 2, 4, 5, 6, 7, 8 and 10 of this subpoena been respectfully placed in this case after these folders that [fol. 2164] have been respectively marked as "Paragraphs 2, 3, 4, 5, 6, 7, 8 and 10" of that subpoena?

A. Yes, sir.

Mr. Wright: I will ask to have those folders just referred to marked with the next numbers.

The Court: They can all be marked later.

Mr. Wright: Eight exhibit numbers.

(Thereupon folders respectively marked as "Paragraphs 2, 3, 4, 5, 6, 7, 8 and 10 of subpoena, referred to, were marked as Plaintiff's Exhibits Nos. 706 to 713, inclusive.)

Q. Have you produced any documents in response to paragraph 9 of that subpoena, Exhibit 705?

A. No, sir.

Q. You are unable to locate such documents?

A. That is correct.

Q. Where are the documents that are produced in response to paragraph 11 of this subpoena, Exhibit 705?

A. They are produced under paragraph 2.

Q. They are contained in the folder marked "Paragraph 2" that you just referred to?

A. That is correct.

Q. Now, you were also served, were you not, with a further subpoena, and this copy of subpoena you just handed me is a copy of the subpoena served on United [fol. 2165] Artists August 15th, 1944?

A. That is correct.

Mr. Wright: I will ask to have that marked for identification.

(Thereupon copy of subpoena of August 15th, 1944, was marked as Plaintiff's Exhibit No. 714 for identification.)

Q. The documents produced in response to paragraphs 1 and 4 of that subpoena just marked for identification as number 714 are those in this file cabinet which have been placed behind the folder marked "Paragraph 1, subpoena August 15th" and "Paragraph 4, subpoena August 15th" respectively?

A. Yes, sir.

Mr. Wright: I will ask to have those given the next two plaintiff numbers, that would be 715 and 716.

(Thereupon two folders marked "Paragraph 1 and Paragraph 4, respectively, referred to, were marked as Plaintiff's Exhibits Nos. 715 and 716 for identification.)

Q. And then these you have produced in response to paragraph 3 of that same subpoena?

A. Yes.

Mr. Wright: I will ask to have that marked as Exhibit 717.

[fol. 2166] (Thereupon folder marked "Paragraph 3", referred to, was marked as Plaintiff's Exhibit No. 717 for identification.)

Mr. McClennen: For identification.

Mr. Wright: For identification, all of it. Now, will you mark this bound volume here as Plaintiff's Exhibit 718.

(Thereupon bound volume, referred to, was marked as Plaintiff's Exhibit No. 718 for identification.)

Q. I will hand you this bound volume marked Exhibit 718 for identification, and ask you if that was prepared under your supervision?

A. Yes, sir, it was prepared under my supervision.

Q. And what does that contain?

A. That is the play off record of the United Artists pictures as requested in interrogatories.

Q. In the interrogatories served on your by the Government and answered by you while you were still a defendant in the case?

A. That is right.

Q. Or your company. Now, these sheets contain at the top in the middle the name of each town where the picture is played?

A. That is correct.

[fol. 2167] Q. And the run is stated at the right of the top?

A. Correct.

Q. And on the sheet appears the dates on which the various pictures played at the theatre specified?

A. Correct.

Q. And the list of pictures in the left-hand column is the list released during the particular seasons noted at the top of the page?

A. That is correct.

Q. And the next column after the picture title shows the number of the contract under which it was played?

A. Correct.

Q. And the next column shows the date of the contract?
A. Correct.
Q. The next column the theatre in which it was played?
A. Correct.
Q. The next column is the film rental?
A. Correct.
Q. That was the film rental actually paid?
A. Correct.
Q. The next column is the date played?
A. Correct.
Q. That shows the period of actual exhibition at the theatre?
A. Correct.
[fol. 2168] Q. Then the last column, you have two headings, "Schine" and "Independent"?
A. That is correct.
Q. Where the rentals appear in the independent column, it was played in the theatre that was independent according to your records?
A. Yes, sir.
Q. And in the Schine column, the one that belonged to Schine?
A. Yes, sir.
Q. That is, these tabs subdivide the data for the various exchange areas?
A. Correct.
Q. Those under Buffalo are all served out of Buffalo?
A. Correct.
Q. Those out of Cincinnati, out of Cincinnati?
A. Yes, sir.
Q. And the same is true of Cleveland and Washington?
A. Yes, sir.
Q. Is this the most accurate record you have of the data set forth there?
A. This is an accurate record.
Q. Do you have any that are any more accurate?
A. No, sir.

Mr. Wright: That is all.
[fol. 2169] The Court: Any cross-examination?
Mr. Wright: Oh, yes.

Q. As I understand it, this was originally furnished to the Government with the understanding that it would be kept confidential and not filed in court, is that correct?

A. That was the intent.

Q. You are now agreeable, however, to having that book examined freely by counsel for the defendants?

A. Yes, sir.

Q. There is occasionally a notation under "Rental", I think appears the term "B. C.", or the initials "B. C.", what does that mean where that appears?

A. Blanket contract.

Q. That means there was no particular rental specified for that particular theatre?

A. That is correct.

Q. But there was merely a rental specified for a group of theatres of which the one after which "B. C." appears was a part?

A. That is correct.

Cross-examination.

By Mr. McClennen:

Q. The make-up of this last exhibit for identification that you have been describing, is it the fact that for con- [fol. 2170] venience in this particular case, you group the various Schine contracts under the one heading of "Schine" irrespective of the particular Schine Companies that were the actual contracting parties and group all other theatres under the title "Independent"?

A. The way we prepared the schedule was by season and by picture release, if it happened to be a Schine or an Independent.

Q. If it wasn't a Schine, you called it an Independent?

A. That is correct.

Q. Irrespective of whether that other one was an Independent in the true sense of the term, that is, a theatre not affiliated with a producer or not?

A. I don't quite understand your question.

Q. If it wasn't a Schine contract, in some of its subsidiaries, you called it an Independent?

A. That is right.

Q. Irrespective of whether it was an actual Independent in the common sense of the trade or not?

A. That is right.

Q. That is in the trade you distinguish between Independ-

ent theatres as those that do not have an association or affiliation with a producer or distributor?

A. That is right.

Mr. Wright: I might say the tabulation shows in each [fols. 2171-2179] case the theatre in which it plays and the "Independent" or "Schine" is merely a secondary classification.

The Court: We will adjourn now until tomorrow morning at 10 o'clock.

(Whereupon a recess was taken until tomorrow, Friday, October 6th, 1944, at 10 o'clock a. m.)

[fol. 2180] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA,

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants.

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 6th, 1944, at 10 o'clock a. m.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 2181] PROCEEDINGS

STEPHEN W. McGRATH, resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Further direct examination.

By Mr. Wright:

Q. Mr. McGrath, I hand you this folder containing certain tabulations, marked for identification as Plaintiff's Exhibit 719, and ask you if the tabulations therein contained were prepared under your supervision?

A. Yes, sir.

(Thereupon folder containing certain tabulations, referred to, was marked as Plaintiff's Exhibit No. 719 for identification.)

Q. And the first tabulation that appears there headed "Blanket Contracts"; are the contracts there listed those that are referred to where the notation "B.C." appears in this Exhibit 718?

A. That is correct.

The Court: That is supposed to be what?

Mr. Wright: This Exhibit 718 is the tabulation of the play off of United Artists pictures in the various Schine [fol. 2182] towns with a statement of rentals and where there is no individual rental, but a blanket contract, the statement "B.C." appears with a contract number. This tabulation here shows the blanket contracts by contract numbers, one is keyed to the other.

Q. Now, would you tell the Court what the other tabulation is in the book?

A. It is a tabulation of the film rental received by United Artists from various situations, whether operated independently or operated by the Schine Circuit, for a period from 1934, by season, through 1939-40.

Q. Those are totals received from each town for each season, are recorded there?

A. That is correct.

Q. And then there is a recapitulation, is there not, at the end?

A. That is right.

Q. By exchanges?

A. Well, no, it is not by exchanges, by total for all exchanges.

Q. The recapitulation there, the total for all exchanges is on the last page numbered 16?

A. Well, there are really two schedules in here. On page 15, it shows a recapitulation of the total film rental [fol. 2183] derived from both Schine and Independent operations. That is these figures down in here (indicating).

Q. And page 16 is a recap. of the Schine rentals?

A. Film rental received from the Schine Circuit.

Q. Are these tabulations that you have prepared, that are in this folder marked Exhibit No. 719 for identification, the most accurate record you have of the facts recorded there?

A. Yes, sir, as a matter of fact, they are a recapitulation of the various totals that are shown in that book.

Q. By that book you are referring to Exhibit 718 for identification?

A. Correct.

Mr. Wright: Have you those defense exhibits 82 and 83?

Mr. McKay: What are they?

Mr. Wright: They are the Mundus Distributing Corporation contracts which you introduced yesterday. (Defendants' Exhibits 82 and 83 produced and handed to Mr. Wright.)

Q. I hand you these exhibits marked in evidence as Exhibits 82 and 83——

Mr. McKay: D-82 and D-83.

Q. (Continuing:) D-82 and D-83, which bear the name "Mundus Distributing Corporation" at the top, and ask you if you can tell us what that corporation is?

[fol. 2184] A. Well, Mundus was an English producing corporation and they made an agreement with United Artists for the distribution of their product in the United States.

Q. I call your attention to the titles of the pictures that are listed on those two contracts, and to the fact that none of them appear in the schedule of your United Artists releases, which was marked as Exhibit No. 717 for identifica-

tion. Can you tell us why they were omitted from the schedule?

A. Well, after referring to the titles, when I heard the mention made of Mundus pictures, I didn't even remember the titles of the pictures, and I am referring to the titles of the pictures set forth in the contracts, to my recollection I am not sure if any of them were ever released.

Q. By "released," you mean actually made available to the exhibitors?

A. Correct.

[fol. 2185] Q. And if they were released do you know whether they were ever sold in more than a few situations?

Mr. McClennen: That is objected to.

The Court: If he knows in how many situations they have been sold he may tell. I do not know how he would.

Mr. McClennen: If your Honor please, well, even if he did I submit it has nothing to do here. Contracts were made with this exhibitor for them. If they were not made available that ends it. If they were made available it makes no difference who else played them in other situations. I submit it is immaterial.

The Court: What is the materiality of it?

Mr. Wright: What these were were pictures which were simply unsalable, for the most part. There were only a handful of exhibitors in the whole country who ever bought these pictures. They were not generally released pictures.

Mr. McClennen: There is no evidence whatever of any such situation and it ought not to be stated when we are arguing whether this is admissible or not.

Mr. Wright: The Court asked me what I expected to show [fol. 2186] and how this is material, and that is what I do expect to show by this witness.

The Court: I do not know how he can tell.

Mr. Wright: I asked him, if the Court please, whether he knew.

The Court: I do not see its materiality. I will let him answer. Go ahead

A. I don't know.

Q. There was another title on, I believe, Defendants' Exhibit 84, "Congo Raid," and that also does not appear on the schedule of releases marked Exhibit 717. Can you tell us why that is?

A. Our "Congo Raid" was released under the title "Sanders of the River."

The Court: Under another name?

The Witness: That is right.

Mr. Wright: That is all.

Mr. McClennen: No cross examination.

Mr. Clagett: Before calling the next witness, your Honor, I should like to read from the interrogatory answers 17-A and 18, with respect to Schine Theatres in Rochester, the Schine defendant interrogatories.

Mr. McClennen: May I inquire whether the answers to [fol. 2187] interrogatories as a whole are to be deemed in evidence?

Mr. Clagett: We have not offered them as a whole as yet.

Mr. McClennen: Then if they are not offered I submit they should not be read from.

Mr. Clagett: We are offering this portion now.

Mr. McClennen: I submit a portion of an answer should not be offered. The whole answer should be offered or none at all.

Mr. Clagett: Your Honor has accepted portions of interrogatories as we have come to specific situations from time to time.

The Court: For the purpose of elucidation, I suppose?

Mr. Clagett: Yes, sir.

The Court: You have the right, I suppose, to likewise read from them, Mr. McClennen.

Mr. McClennen: There is the difficulty, if your Honor please. I do not understand that we do have the right to do that. I am desirous that the matter should not be left in confusion. I do think that if any portion of any answer is read we have the right to introduce the whole of that answer but if these are just references to pieces that are in evidence, all well and good. I submit that the plaintiff should not be [fol. 2188] permitted to introduce a part of an answer to one interrogatory, that it should all be introduced or none of it, and that until such introduction it is not before the Court. This is the first time that I have had occasion to deal with this matter. I make the objection that nothing should be read from this answer unless it is understood that the whole answer is in evidence, so that it is available to both parties as a piece of evidence.

Mr. Wright: If the Court please, that is contrary to my understanding of the procedure that we have been following.

In each case when we have read an answer to the interrogatory in evidence we have assumed that that was being treated as an offer of that material which was read in evidence and received as such. There may be many statements on these interrogatories which are self-serving and which the defendants may wish to establish as part of their case, but I see no obligation on our part as a part of our case to [fol. 2189] offer in evidence any part of these interrogatories except those as to which we are satisfied are true and those which we deem relevant and material in the presentation of our case.

The Court: Counsel does not object to your producing it, providing he is permitted to also introduce the answer on the same subject matter.

Mr. Clagett: His objection has been to introducing part of it.

The Court: His statement was that unless you were permitted to read the whole answer—I suppose that part that relates to the part read by the plaintiff——

Mr. Wright: We have no objection to the entire answer being called to your Honor's attention at the time we offer such parts as we deem relevant, but we do object to such statements being received in evidence there as may appear to be self-serving. The theory on which these are evidence against the defendants on our behalf, I take it, is that they are admissions.

The Court: The rule provides, does it not, that it may be [fol. 2190] read by the defendant?

Mr. Wright: I do not think, if the Court please,——

The Court: I mean such a part of the answer as relates to the subject matter concerning which you read.

Mr. Wright: I do not think, if the Court please, that by merely inserting in an answer to an interrogatory material which the defendant might wish to develop as part of its case that that would relieve it from the necessity of establishing that fact by competent evidence if it were a fact, which we did not concede. Now, that apparently is what Counsel proposes to do. I do not understand that interrogatories are available for that purpose. That is, while they may be used by us as a substitute for testimony, that is on the theory that they were admissions made for this purpose. I do not believe that they may be used by the defendants in place of testimony, in so far as they are self-

serving or tend to establish facts which we think might otherwise be disputed.

[fol. 2191] Mr. McClennen: My purpose is not as stated by Mr. Wright. My contention is that an answer which is responsive to the question should be read as a whole or not at all. If it contains matter not germane to the interrogatory that is a reason for a motion to strike it out from the answer, but what happens here is that we have been asked to state all these various things, namely, the town, the theatre, the nature of our interest in it, the percentage, the dates of the leases, the statement of any other interest, date of disposal and name of purchaser, where such was the case, and to that we have answered as to each one of those places. Nothing self-serving in any way. It is an answer to the interrogatory. In common fairness, if this schedule is to be used in one town, it should be usable in all towns, as the shortest way of getting this matter in. There is not anything that is contrary to the contentions of the United States in this answer. It is simply the brief, easy way of [fol. 2192] showing those facts. I urge that when the objection is taken that an answer is not to be split up. It is to be put in as a whole or not at all.

The Court: Why should the rule be any different as to interrogatories than as to depositions?

Mr. Wright: I take it that they are for somewhat different purposes. A deposition is the means of developing evidence under oath where each party has an opportunity to cross-examine, and that of course is the result we come out with, just the same as testimony. However, when you are dealing with an interrogatory it seems to me that stands on a somewhat different footing. The theory on which we can use the interrogatories without offering the witness who supplied the information is that certain facts have been admitted. To the extent that a particular admission is qualified then of course the qualification, I suppose, should appear at the same time. But here you have a whole series of answers, that is, in the first column the name of the theatre is stated; the second column calls for "Nature [fol. 2193] of the interest." The next column calls for "Extent of the interest." The next column calls for "Date acquired." The next column calls for "Other interest, if any, and extent thereof," and the next column says, "Date disposed of, if no longer owned." The next column says "Name of Purchaser, if sold, and remarks."

[fol. 2194] The Court: What—remarks?

Mr. Wright: All remarks, yes. The next column——

Mr. Clagett: That is the way they set it up themselves.

Mr. Wright: The all remarks, we did not ask for their remarks, but that was set up in the answer.

Mr. McClennen: Could I interrupt at that point? Under "Remarks" on the page, that is also—, I don't know how far it runs,—is blank.

Mr. Wright: This question as far as Rochester is concerned, I think is academic. I do not think there is anything in this answer that is in dispute, but there is in others, and as long as the question is raised we might as well discuss our views.

The next column is "Closed Period, If Any"; the next column is "Remarks Re Closed," which is something we did not call for, but which they added in their tabulation.

The Court: Does it show what the closed period is?

Mr. Wright: From time to time, yes, and in some cases we agree those closed periods are correct. In other cases where we think they are inaccurate, we don't see that there is any reason why we should be bound by what they state [fol. 2195] in the interrogatory as to the closed period.

The Court: You mean it is not responsive to your question?

Mr. Wright: There are two questions involved. There are some remarks in the interrogatories that are not responsive.

The Court: Are they responsive to the questions at all, under the subject of "Remarks"?

Mr. Wright: No, those, I say, are not responsive.

Mr. McClennen: Could I interrupt again? The interrogatory asks for the reasons for closing.

Mr. Wright: That is not the heading. You have nothing here, you have simply used the heading "Remarks."

The Court: Does it state under "Remarks" the reasons for closing and the period?

Mr. McClennen: Yes, and that is what is stated under "Remarks."

Mr. Wright: One column calls for the closed periods, if any. There may be, if there is no dispute between us as to the closed periods, the situation that the interrogatory is perfectly satisfactory evidence. Where, however, we have information or evidence——

The Court: The column is "Closed Period"?

[fol. 2196] Mr. Wright: Yes, that is the column.

The Court: Mr. McClennen says you asked the reasons for closing.

Mr. Wright: Yes. Apparently in response to that he has "Remarks Re Closed Period"; that is another column.

The Court: He has answered your question, then.

Mr. Wright: That is right. I say if we are in agreement as to the answer as to reasons, for example, that we are perfectly free to offer that statement of reasons as an admission, but if the reasons are self-serving reasons, the validity of which we don't concede, we say that putting them into the interrogatory does not relieve them from the necessity of introducing such evidence as might be necessary to establish the correctness of the reason asserted.

The Court: In other words, you can split up the answer, you mean?

Mr. Wright: Yes, we say if any fact here, which is separately listed, we are entitled to show those facts.

The Court: As admissions?

Mr. Wright: Yes, as admissions.

[fol. 2197] The Court: Ordinarily the question does not arise. Ordinarily the answer as a whole is an answer to a specific question.

Mr. Wright: Well, the question is subdivided into these various requests, with the name of the theatre, and nature, according to the columns I have listed.

The Court: Suppose the witness is not available?

Mr. Wright: Well, if the witness were not available that would perhaps present a different problem, but, in any event, it seems to me the fundamental effect in permitting statements supplied in this manner to be used by the defendants, rather than by the plaintiff, is that there is no opportunity on our part to cross-examine the maker of the statement. That is the respect in which the interrogatory answers differ from data which is obtained through depositions, and it may be an important difference in some cases. In so far as Rochester is concerned, I don't believe we would have any objection to reading the whole thing, although much of it is probably immaterial for our purposes, but we don't concede at all that the defendants can [fol. 2198] just throw in evidence all of the material that they have seen fit to put in the answers to interrogatories for their proof, and as part of our case.

Mr. McClennen: If your Honor please, for at least 100 years it has been the well settled, clear rule, that when a responsive answer to an interrogatory is made, that the whole of that answer must be read by the party presenting any part of that answer. Now, of course, we are not asking that this all be read now, but we are asking that it be deemed in evidence, if any part of it is referred to, that either none of the answer to the interrogatory 17-A is to be deemed in evidence, or else the whole of it is to be deemed in evidence.

The Court: I understand from counsel that they do not object to this specific case dealing with Rochester, so I will examine the question further and pass on this without prejudice, I think.

Mr. McClennen: Well, I state our position to be that we assert that, if any part of that answer is read, we have the [fol. 2199] right to read the whole of the answer, not merely as to Rochester, but the whole of 17-A.

The Court: I am dealing now only with Rochester.

Mr. McClennen: And I am making the assertion so that when we wish to read some parts of it, we shall be in a position to do so.

The Court: In view of the statement made by Mr. Wright, I am going to receive this and permit you likewise to read any of the answer in the case of Rochester.

Mr. Wright: We have no objection to his reading it, but we may object to such parts of his reading as appear to be self-serving, from being received in evidence as evidence.

The Court: I thought there wasn't any question raised——

Mr. Wright: As to Rochester there is no question.

The Court: Your inquiry here is only as to Rochester?

Mr. Wright: As to Rochester we have no objection to the whole answer being read.

The Court: I mean by that, do you gentlemen state you can read that part of the interrogatory because of his inquiry as to one?

Mr. McClennen: I claim we have a right to go into any part of answer 17-A.

The Court: No question has been raised on that.

[fol. 2200] Mr. McClennen: 17-A refers to all places, and this is just one line of a voluminous answer. The importance is this: It would take, well, I don't want to be excessive in my remarks, but I should say weeks to prove the

dates of acquisition of these things, the nature of the interest and so forth. There isn't going to be the slightest dispute about it, and we ought to be able, when this information has all been got together in this tabular form, and is a proper answer,—we ought to be able to use it from that source without having to take up a great quantity of time and collection of documents which will be wholly wasted, so far as the triumph of justice in this case is concerned.

The Court: Well, the force of the objection and merit to the position of the Government is that they will not have the opportunity to cross-examine the one interrogated with respect to certain matters that are set forth in the answer with respect to its admission.

Mr. McClennen: They have the privilege of not reading any part of the answer.

The Court: Yes.

[fol. 2201] Mr. McClennen: To 17-A, but they don't have the privilege of carving up our answer so far as it is responsive to the interrogatory.

The Court: What position would they be in to cross-examine the one interrogated with respect to the specific answer?

Mr. McClennen: There is no right of cross-examination of an answerer to interrogatories.

The Court: I am speaking on the trial.

Mr. McClennen: I mean at the trial. If they want to call the copiler of this answer and interrogate him as to Rochester, as a witness, they have that privilege, and they can cross-examine him.

The Court: Call him as their witness or call him for cross-examination?

Mr. McClennen: If they call one of our people, I suppose they call him for cross-examination.

The Court: I am speaking about the one who gave the answers to the interrogatories. It might be somebody else. The Government, of course, should have the opportunity to cross-examine in some way with reference to matters which they do not admit.

Mr. McClennen: Undoubtedly if they put it in by evi-[fol. 2202] dence, but that does not give them a right to stop at a comma in the course of our answer to one interrogatory, that is exactly responsive to the answer. The rule, I submit, has never been departed from, that, if the

answer is responsive to the interrogatory, the whole of it must go in or none of it; that there is no election to carve it up and in that way distort the position of the defendant in making the answer.

The Court: Well, I will receive this with respect to Rochester and deal with the other situation as it arises.

Mr. McClennen: I have not asked any ruling at this time beyond giving notice that we contend that we have a legal right to read any part of that answer, if any part of it is read.

Mr. Clagett: I would like to emphasize once again, your Honor, that the portion of this answer under "Remarks Re Closed Periods" is something that we may not want to concede.

Mr. Wright: That is not as to Rochester.

Mr. Clagett: That is true. In his answer 17-A and 18 with respect to Rochester, Schine Theatres: Dixie, Lessee; [fol. 2203] date acquired, August, 1932.

Mr. McKay: You left out "Extent of Interest."

Mr. Clagett: Seating capacity 834.

The Grand, owner; leased June, 1924; fee, August, 1925.

Mr. McClennen: Are you sure that you are reading the right numbers, against our copy it did not read as you read.

Mr. McKay: The Dixie capacity is 892 and you read 834 and left out this column (indicating).

Mr. Clagett: I did not intend to read all of those, I am not reading completely all columns as listed.

Mr. McClennen: I understood this offer was to be all of Rochester and if any of it is read, I urge, for additional reasons, all of Rochester should be read.

Mr. Clagett: May I ask the reporter to strike that, so we won't have repetition, and I will read this, and read all answers.

Mr. McClennen: If you will read the heading of the column against which the specific answer comes.

Mr. Clagett: Dixie, nature of interest, lessee; extent of interest, 100 per cent; date acquired, August, 1932; other [fol. 2204] interests, if any, none; there are certain blanks in here, and I will indicate that; date disposed of, if no longer owned, blank; name of purchaser, if sold, blank; seating capacity, 892; closed periods, if any, blank; remarks re closed periods, blank; owner or leased, leased; if leased, name of lessor, Dixie Theatre Corporation, Rochester, New York.

Grand, nature of interest, owner; extent of interest, 100 per cent; Date acquired, leased, June, 1924; fee, August, 1925; other interests, if any, none; date disposed of, if no longer owned, blank; name of purchaser, if sold, blank; seating capacity, 834; closed periods, if any, blank; remarks re closed periods, blank; owned or leased, leased, June, 1924; fee, August, 1925; if leased, name of lessor, first leased, then acquired fee from owner committee, owner incompetent.

Liberty, owner, extent of interest, 100 per cent; date acquired, leased October, 1926; fee, February, 1939; other interests, if any, none, except Paramount interests, 1928, 1933; date disposed of, if no longer owned, blank; name of [fol. 2205] purchaser if sold, blank; seating capacity, 1256; closed periods, if any, blank; remarks re closed periods, blank; owned or leased, leased October, 1926; fee, February, 1939; if leased, name of lessor, leased originally from Levy, then purchased from Fennybessy.

The Court: There was something about Paramount interests.

Mr. Clagett: They don't indicate the extent.

The Court: What does it say, what interest was there, 100 per cent? They say they bought it?

Mr. Clagett: Leased, October, 1926, and fee, February, 1939.

The Court: What about Paramount?

Mr. Clagett: The extent of the interest there is not indicated, simply states "No interest except Paramount, 1928, 1933."

The next is the Riviera; nature of interest, owner; extent of interest, 100 per cent; date acquired, leased October, 1926; fee, April, 1927; other interests, if any, none except Paramount interest, 1928, 1933; date disposed of, if no longer owned, blank; name of purchaser, if sold, blank; [fol. 2206] seating capacity 1508, closed periods, if any, blank; remarks re closed periods, blank; leased, October, 1926; fee, April, 1927; if leased, name of lessor, owner Joseph Jorosolow, Rochester.

The State, nature of interest, owner; extent of interest, 100 per cent; date acquired, leased, January, 1926; fee, January, 1928; other interests, if any and extent thereof, none except Paramount, 1928, 1933; date disposed of if no longer owned, blank; name of purchaser, if sold, or remarks, blank; seating capacity, 1026.

Mr. McKay: 1062.

Mr. Clagett: 1062. Closed periods, if any, blank.

The Court: What did you say just before that?

Mr. Clagett: I read 1026; it is 1062.

The Court: What?

Mr. Clagett: Seating capacity. Closed periods, if any, blank; remarks re closed periods, blank; owned or leased, leased, January, 1928; if leased, name of lessor, Thomas Demeco, builder and owner, Rochester, New York.

The next is the Cameo, owner; that is the nature of the [fol. 2207] interest, owner; extent of interest, 100 per cent; date acquired, May, 1936; other interests, if any, none; date disposed of, if no longer owner, blank; name of purchaser, if sold, blank; seating capacity, 1258; closed periods, if any, blank; remarks re closed periods, blank; owned or leased, owned.

[fol. 2208] The next is "Lake"; "Nature of Interest: Lessee"; "Extent of Interest: 100%." "Date acquired: January, 1936." "Other interests, if any, and extent thereof: None." "Date disposed of, if no longer owned." Blank. "Name of purchaser, if sold, or remarks: None." Seating capacity: 840." "Closed periods if any." Blank. "Remarks re closed periods." Blank. "Owned or leased: Leased." "If leased, name of lessor: Name of owner not presently available."

Mr. McKay: Mr. Antevil informs me that it probably was in process of foreclosure, so that it was not possible for us at the time to distinguish who the real owner was.

Mr. Clagett: The next is: "Name of theatre: Madison." "Nature of interest: Owner." "Extent of interest: 100%." "Date acquired: February 1, 1939." "Other interests, if any, and extent thereof: None." "Date disposed of, if no longer owned," blank. "Name of purchaser, if sold, or [fol. 2209] remarks," blank. "Seating capacity: 1381." "Closed periods, if any," blank. "Remarks re closed periods," blank. "Owned or leased: Owned." "If leased, name of lessor," blank.

The next is the Monroe. "Nature of interest: Owner." "Extent of interest: 100%." "Date acquired: February, 1939." "Other interests, if any, and extent thereof: None." "Date disposed of, if no longer owned," blank. "Name of purchaser if sold, or remarks," blank. "Seating capacity: 1186." "Closed periods if any," blank. "Remarks re closed periods," blank. "Owned or leased: Owned."

West End: "Nature of interest: Owner." "Extent of interest: 100%." "Date acquired: February, 1939." "Other interests, if any, and extent thereof," blank. "Date [fol. 2210] disposed of, if no longer owned," blank. "Name of purchaser, if sold," blank. "Seating capacity: 832." "Closed periods, if any," blank. "Remarks re closed periods," blank. "Owned or leased: Owned."

Webster: "Nature of interest: Owner." "Extent of interest: 100%." "Date acquired: September, 1940." "Other interests, if any, and extent thereof," "none." "Date disposed of if no longer owned: Previously operated with Fogel & Tishkoff up to December, 1933, when Schine withdrew." "Name of purchaser if sold or remarks: Disposed of interest in previous operation to Fogle & Tishkoff in December, 1933." "Seating capacity: 1099." "Closed periods, if any," blank. "Remarks re closed periods," blank. "Owned or leased: Owned."

I think I should add, outside of the interrogatory, for the record that this theatre was reacquired by Fogle under [fol. 2211] your Honor's temporary order of May 19, 1942, being one of the theatres, as indicated by the date acquired here, September, 1940, after the suit was filed.

The next theatre, Plaza. "Nature of interest: Owner." "Extent of interest: 100%." "Date acquired: 1940." "Other interests, if any, and extent thereof: None." "Date disposed of if no longer owned: September 11, 1941." "Name of purchaser if sold or remarks: Sharpe & Huurmann, d.b.a. Old Fashioned Cracker Co., Rochester, N. Y." "Seating capacity," blank. "Closed periods, if any: Closed since acquisition." "Remarks re closed periods: Never operated as theatre." "Owned or leased: "Owned."

The Court: Never operated as a theatre?

Mr. Clagett: Yes, never operated as a theatre. The title of the column was "Remarks re closed periods." Under [fol. 2212] that "Never operated as theatre."

The Court: Is that likewise one of those included in the temporary order?

Mr. Clagett: This was not. It was disposed of under column "Date disposed of: September 11, 1941," which was prior to the entry of the temporary order.

The Court: You say it was never operated as a theatre?

Mr. Clagett: That is right.

Mr. McClennen: The answer as to Rochester having been read, I bring to your Honor's attention that the answer as read was not only to interrogatory 17-A but also to interrogatory 18, and we claim that we have the right to treat as in evidence, so that it can be referred to by us, the entire answer to interrogatory 17-A and interrogatory 18. I think it very likely that there will never be occasion to test this claim. I mean it will, as we want to refer to other parts of the answers as the trial progresses, but we make that claim that the entire answer to 17-A and 18 is now in evidence by virtue of the reading of a part of those answers.

[fol. 2213] Mr. Clagett: We renew our contention for the record——

The Court: You have already stated that.

Mr. Clagett: I think so.

The Court: Anything further?

Mr. Clagett: Nothing. We have a problem with certain contracts that were not identified, certain contracts with major distributors that were not identified when the representatives of the major distributors were here in the last few days. These contracts were called for in a subpoena dated October 2, 1944, and as far as I know at least part of them were not here when the representatives of the major distributors were on the stand. I would like to——

The Court: Have you submitted them to Counsel?

Mr. Clagett: I have not yet, no, sir. I would like to suggest that Counsel stipulate that if the representatives of the respective majors were here they would identify these as produced from their files in response to the subpoena of October 2, 1944.

The Court: You had better submit them to them.

[fol. 2214] Mr. McClennen: If we may take the papers and look them over we shall very likely be willing to stipulate, not before. We will take them and look them over.

Mr. Clagett: I will call the next witness, Mr. Chester Fenyvessy.

CHESTER FENYVESSY, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Clagett:

Q. Mr. Fenyvessy, will you state your name and place of residence?

A. Chester Fenyvessy, 22 Ramsey Park, Rochester, New York.

Q. Did you operate the Madison, the Monroe and West End Theatres and own the fee of the Liberty Theatre until February, 1939?

A. Yes, sir.

Q. Did you on that date make a deal and sell those theatres to Schine?

A. Yes, sir.

Q. Will you state the nature of your connection with these theatres, that is, with reference to ownership and [fol. 2215] operation?

A. It was a family enterprise in which the father and sons were engaged, were interested.

Q. How long have you been engaged in the motion picture business?

A. 30-odd years.

Q. The better part of that time in Rochester?

A. Yes, since 1918 in Rochester, and I was in Rochester prior to that, in 1910.

Q. How long did your father's connection with the motion picture industry in Rochester go back?

A. 1909 or 1910.

Q. Have some members of your family been engaged in the motion picture industry in Rochester continuously since that time?

Mr. McClennen: One moment. I submit perhaps the answer is not material in this case.

The Court: Has it any materiality?

Mr. Clagett: Merely showing the length of his experience.

The Court: You are asking now about members of his family. He may state his own knowledge.

Mr. Clagett: He has done that.

By Mr. Clagett:

Q. Now can you state the date that the Madison was acquired?

A. In the spring of 1929. By us, you mean?

[fol. 2216] A. That is right.

Q. What was the nature of the interest?

A. It was owned in fee.

Q. Can you state the date the Monroe was acquired?

A. About 1933.

Q. What was the nature of that interest?

A. Fee.

Q. When was the Liberty acquired?

A. About 1932.

Q. What was the nature of that interest?

A. Fee.

Q. Was the theatre leased at the time it was acquired?

A. Yes, it was leased.

Q. Who was the lessee at that time?

A. Schine Theatres.

Q. When was the West End acquired?

A. At the same time.

Q. As the Liberty?

A. As the Liberty, yes.

Q. What was the nature of that interest?

A. Fee.

Q. Now, Mr. Fenyvessy, will you state the names of the first-run or the move-over run or second-run theatres in the down-town section? I mean the principal high admission priced theatres.

[fol. 2217] Q. First-runs?

Mr. Clagett: First-runs, including move-overs or second-runs.

A. First-run, Loew's, Rochester, the Century Theatre, the Palace Theatre, the Regent Theatre, the Temple Theatre, and subsequent runs, the Strand and Capitol.

Q. What is the run that the Capitol Theatre has had?

A. On most product they have had a third-run down-town; sometimes second.

Q. Sometimes second?

A. Yes.

Q. What was the run the Strand had?

A. At what time?

Q. Well, 1939.

A. Subsequent run.

Q. Will you state what major motion picture product the Loew's Theatre uses first-run?

A. Metro.

Mr. McClennen: When you say "uses" you mean these past times; you don't mean now?

Mr. Clagett: I am thinking about the period 1931 to 1939.

A. United Artists, Columbia and Metro.

Q. And the other theatres that you have named used the product of Fox, Warner, Paramount, RKO and Universal?

A. Yes, and some independent product.

[fol. 2218] Mr. McClennen: I object to putting all the theatres together and being led that way. If you will separate them, all right.

Q. Will you state what theatres are controlled by RKO, RKO-Paramount-Comerford in Rochester?

Mr. McClennen: That also calls for a conclusion. I object to it.

The Court: Yes. I do not know where he would know where the control was.

Q. What theatres are operated by RKO, Paramount-Comerford?

A. The Regent——

Mr. McClennen: I urge that the question be separated so that we can tell what the answer means.

The Court: What was the question, operated by whom?

(Question read.)

The Court: I think you should separate them. What theatres are operated by RKO?

Mr. Clagett: I think I can clarify that.

Q. Is there a Paramount-RKO-Comerford partnership?

Mr. McClennen: That I object to.

The Court: I do not know how he would know about that.

Mr. Clagett: He probably knows, your Honor, as well as he knows that certain theatres belong to Schine.

The Court: If they were conveyed to Schine at a certain [fol. 2219] time, but he wouldn't know if Schine owned them today.

Q. Who operated in this period of 1931 to 1939 the Palace Theatre, if you know?

A. The RKO organization.

Q. The whole period?

A. I think so, yes.

Q. Who operated the Century Theatre in the same period?

A. It was operated by Comerford and Paramount, and there was a management arrangement with RKO.

Mr. McClennen: I ask that that last be stricken out.

The Court: Strike it out, unless he has personal knowledge of it. Do you have personal knowledge of any management arrangement between Comerford and RKO?

The Witness: Well, hearsay. I know it to be so but I can't offer any proof.

Mr. McClennen: May the statement be stricken out?

The Court: Strike it out.

By Mr. Clagett:

Q. Can you state who operated the Regent?

A. Comerford and Paramount.

Q. Can you state who operated the Temple?

A. RKO.

Q. Can you state who operated the Capitol?

[fol. 2220] A. Comerford and Paramount.

Q. Did you lease the Capitol to Comerford and Paramount?

A. Originally we leased it to Comerford & Fay, a corporation in which they were interested.

Q. Was there any change in that lease?

A. Subsequently it was leased to a corporation known as the Monroe Amusements.

Q. Do you know who controlled the Monroe Amusements?

Mr. McClennen: That is objected to unless there is to be some evidence that it was Schine, and then we object that it should not be put in this form.

The Court: Yes, I do not know how he would know.

Q. You have continued to control the fee, the ownership of the Capitol?

A. Yes, sir.

Q. Who owns the Strand Theatre?

A. An Estate by the name of Curtis.

Q. Did you have anything to do with the Strand originally?

A. As tenants, as lessees.

Q. Up until what period?

A. About 1938.

Q. Do you know who operates the Strand now?

A. Howard Carroll, I believe.

Mr. McClennen: May I interrupt, if your Honor please? [fol. 2221] We were to look up about Carroll, and I am prepared to state now that Howard Carroll was in the employ of some of the defendants from about May, 1931, to June, 1938, in charge of the exploitation of special pictures intermittently as directed from the Schine office, and that in a portion of that period, the latter part, as City Manager of the defendant's Rochester theatres.

Mr. Wright: That seems to differ somewhat from the testimony that Mr. Schine gave. Are we to understand that he was mistaken when he said he managed theatres for him in the early period?

Mr. McClennen: I do not understand that it differs from Mr. Schine's testimony and I have given you the best I could get, on investigation. If you do not want it, strike it out.

Mr. Wright: I do not see that it adds anything to what Mr. Schine said.

Mr. McClennen: I felt that we were under obligation to the Court to investigate, and shall we understand that it is stricken out?

The Court: There is nothing in the record so far only [fol. 2222] the statement of Counsel. There is no proof of your statement. You offer to admit that now?

Mr. McClennen: I wanted to perform my obligation to the Court to find out. I have told the Court. If Mr. Wright does not want it in the record let us deem that it is excluded from the record. I have performed my obligations.

The Court: I will let your statement stand, if you want, as the statement of Counsel, but of course standing alone

it would have no probative force unless it were admitted or accepted by Counsel for the Government.

Mr. McClennen: I don't want it at all. I was asked to find out.

The Court: We will strike it all out, then.

By Mr. Clagett:

Q. Mr. Fenyvessy, can you state what major product the Loew's State Theatre used in the period 1931 to 1939?

A. Loew's Rochester, you mean?

Q. Yes, Loew's Rochester Theatre.

A. Metro, Columbia, United Artists.

Q. Did the product have any additional runs in a down-town theatre before it was shown in neighborhood houses? [fol. 2223] A. At the Strand at one time we had second-run on Columbia.

Q. Can you fix the period of that?

A. Around 1936 and maybe 1937.

Q. Other than that, the product that you have named, that is Loew's or Metro, United Artists and Columbia, did not have a second-run outlet for runs down-town?

A. No.

Q. Was the other major product, other than companies that you have just testified about, given either a hold-over or a second-run down-town in either the Regent, the Temple or the Capitol Theatres?

A. Yes, sir.

Q. Will you state the location of the Schine's Riviera Theatre?

A. On Lake Avenue near the Memorial Bridge, which is the north side of the city.

The Court: What is meant by the Memorial Bridge?

The Witness: It is an important bridge that crosses the Genesee River. It connects two sides of the town.

Q. I would like to have you spot these theatres, as we ask the questions, so that Counsel and the Court can see. If you will stand just a little bit back the other way. I will ask you, first, about the location of the Riviera Theatre. [fol. 2224] I notice that on this map, which has been handed me by Mr. McClennen the theatres are spotted by round white dots. Now will you locate the Riviera Theatre and will you state——

The Court: Does it designate the streets at all? Are the streets shown on the map?

The Witness: Yes, Lake Avenue, Ridgeway on a corner.

The Court: I think that is sufficient. When he points to some place it does not show on the record. If you want to designate on the map and if you spot designate the theatres owned by Schine that would answer the whole inquiry, would it not?

By Mr. Clagett:

Q. Will you state the principal intersecting streets or the main streets which would definitely fix the point of the theatre in each instance?

A. In the case of the Riviera it is Lake Avenue and Ridgeway and very close to the point where the Memorial Bridge comes across the Genesee River.

Q. That is in the northern section of the city?

A. Yes, sir.

Q. Will you state the location of the Schine's Liberty Theatre?

A. On Driving Park Avenue near Dewey.

The Court: That is also near Lake Avenue?

[fol. 2225] A. Yes, about a mile and a half away.

Q. Will you state the location of Schine's Dixie Theatre?

A. Portland Avenue.

Q. That is what section of the city?

A. It is in the east—I would say east section.

Q. Will you state the location of the Schine's State Theatre?

A On Main Street east, south of the Dixie.

The Court: Beyond East Avenue?

The Witness: Yes. Main Street runs in one direction and East Avenue in the other. It is beyond what you might call East Avenue, yes.

The Court: Beyond the intersection of East Avenue and Main?

The Witness: Yes, very much beyond; a couple of miles.

By Mr. Clagett:

Q. Now will you state the location of the Fenyvessy, or what was the Fenyvessy Theatre, the Monroe, until 1939?

A. On Monroe Avenue near Goodman, and that is in the southeast section.

Q. And will you locate the former Fenyvessy theatre, the Madison?

A. On Genesee Street near Frost Avenue. That is on the west side.

The Court: Is that on the west side?

The Witness: That is on the west and south—southwest.

Q. Will you state the type of construction of the Monroe [fol. 2226] Theatre and its principal features from the standpoint of being a motion picture theatre?

A. It was a modern house, built about 15 years ago, steel and brick construction, with fine equipment and very good toilet facilities, and it had the only air-conditioning system in any local neighborhood house, a Carrier system. It was a one-floor house.

Q. Will you state what was the nature of its sound and projection?

A. R. C. A. sound and good projection, very good equipment all the way through.

Q. Appointments, can you state whether its appointments with reference to seats, carpets and floors, were high quality?

Mr. McClennen: Just a moment. The witness should state in his own language those things.

The Court: Describe the equipment further than you have.

A. Well, in 1938, approximately at that time, it had been recarpeted. The seats were the original seats, but they were fine seats and in good condition. It was an attractive house, a one-floor house.

Q. Will you state the type of construction and the principal features of the Madison Theatre, with reference to its use as a motion picture house?

A. It was a modern house, built about the same time as [fol. 2227] the Monroe, about 15 years old, I should say. It was steel and brick construction and had very ample toilet facilities in the basement and on the mezzanine. It had a balcony as well as an orchestra floor. It had a complete stage, with a fly loft, which was unusual for a house of that sort.

Q. Can you state anything further about the equipment and appointments?

A. The carpeting was also new in about 1938. It was in good condition. The seats were the original seats, spring seats with veneer backs, and the house was padded for sound. It had acoustical panels.

[fol. 2228] Q. What was the nature of the residential section in which the Monroe was situated?

A. Very good, much better than average, rather a high-class section.

Q. Are you familiar with the Schine Dixie Theatre?

A. Yes, sir.

Q. Well, with reference to——

The Court: Where did you say that was?

The Witness: On Cortland Avenue.

The Court: What?

The Witness: On Cortland.

The Court: That is the southwest part?

The Witness: That is in the east and north, slightly.

By Mr. Clagett:

Q. With respect to the standpoint of construction and appointments was that theatre as fine a house as either the Madison or Monroe?

Mr. McClennen: That is objected to.

The Court: Read the question.

(Question read.)

The Court: Sustained.

Q. Have you a knowledge of the size of the Dixie Theatre?

A. Not a positive knowledge, no.

Q. Have you an approximate knowledge of the number of seats?

A. I believe it was around 900, I am not absolutely sure.

[fol. 2229] Q. Well, can you state what was the type of construction of the Dixie Theatre?

A. Well, I don't think it was equal to the Madison or Monroe.

Mr. McClennen: May that be stricken out?

The Court: Yes. State the type of construction.

The Witness: It was a modern house of smaller capacity than those other houses, the Madison and Monroe.

The Court: Brick or frame?

The Witness: Brick, brick and stucco, I suppose, or brick and concrete.

Q. Are you familiar with the appointments of the theatre, such as seats, toilet facilities, rest-rooms and carpet?

A. No, not especially familiar, but it was——

Mr. McClennen: Just a moment, that is the answer.

The Court: When you were there, how long ago was it?

The Witness: Oh, shortly after it was acquired by Schines.

The Court: When was it?

The Witness: In 1932 or 3, I am not positive.

The Court: Do you know the condition as of that time?

Mr. Clagett: I wasn't interested in its theatre appointments especially as of that time. Well, I withdraw that, strike that remark out.

Q. I would ask you, Mr. Fenybessy, to state to the best of your recollection what was the character and condition [fol. 2230] of the appointments and conveniences at about 1932?

A. They were satisfactory for a house of that size in that locality, adequate.

Q. Was that a fine residential area or section?

A. No, it was not a fine residential section.

Q. Was the State located in a fine residential section?

A. No.

Q. Will you state whether the admission prices—will you state the admission prices of the Schine Riviera, Dixie and State, and also the Madison and Monroe?

Mr. McClennen: That is objected to.

The Court: What is that?

Mr. McClennen: That is objected to unless a time is fixed, and something indicative of the witness' knowing the fact accurately.

The Court: The time can be fixed, I suppose, and also show his knowledge, if any.

Mr. Clagett: I was trying to cut down the record as far as possible.

Q. Were you familiar with the admission prices charged at the Schine Riviera, Liberty and Dixie and State in about 1933 or 4?

A. I think it was 25 cents for adults.

The Court: He just asked, were you?

Q. Were you?

[fol. 2231] A. Yes, 25 cents adults and 10 cents for children.

The Court: Just answer the question.

Q. What were they?

A. 25 cents for adults, 10 cents for children, to the best of my recollection.

The Court: For each of those theatres?

The Witness: Yes, all of the theatres, that is, the Riviera, State and Dixie.

Q. And Liberty?

A. And Liberty, yes, 25 cents.

Q. That period I refer to, 1933 or 4, were the prices the same in 1939 in those houses?

A. Yes, sir.

Q. What were the admission prices at the Madison and Monroe in the period from 1932 or 3 to 1939?

A. 25 cents for adults and 10 cents for children.

Q. Then the admission prices in all of these houses in the period from about 1932 or 3 to 1939 were the same?

A. Yes, sir.

Mr. McClennen: Just a moment. That I object to. May that answer be stricken out?

Mr. Clagett: I withdraw the question. It is already in the record.

Q. Now, Mr. Fenybessy, calling your attention to the 1931-32 motion picture season, can you state what run of [fol. 2232] pictures the Madison Theatre had of the Warner product?

A. Second-run.

The Court: What is that?

The Witness: Second run.

Q. In the City of Rochester?

A. Yes, sir.

Q. Calling your attention to the same season of 1931-32 season, can you state what was the run of R. K. O. product which the Madison Theatre had?

A. Second-run, I think.

Q. Did you have the second-run of the Warner product in 1932-33 season?

A. No.

Q. Did you have the second-run of R. K. O. product in the 1932-33 season?

A. No.

Q. With reference to the part of those two companies, can you state what change in run or clearance took place?

Mr. McClennen: That is objected to. If this is of any consequence the contracts with this house would show and it ought to appear definitely from the contracts. This will be a mere statement of the contents of the contracts. I am not aware how it is of any consequence, but, if it is thought [fol. 2233] to be, I submit it should be shown by the papers which determine it.

Mr. Clagett: I want to show from the witness that the run changed, that there was a different run.

Mr. McClennen: That, I submit, should be shown by putting in the contracts for each of those seasons, and they would show whether there was the same or a different run.

Mr. Clagett: I am trying to develop from the witness——

The Court: Your inquiry is as to the Madison. Were you the owner of the Madison at that time?

The Witness: In 1932, prior to 1939, yes, we were.

The Court: You inquired with respect to what year?

Mr. Clagett: It covered the 1931-32 season with reference to Warner and R. K. O.. He testified he had second-run and I asked him whether there was a change of run for the 1931-32 season with reference to those two products.

The Court: During the season?

Mr. Clagett: For the next season.

The Court: I will let him show what they did run the next year.

Mr. Clagett: I merely want to develop from this witness——

The Court: The contracts are not here, but I will let him show what was shown the next year.

[fol. 2234] Mr. McClennen: The contracts are right here.

The Court: He can testify what the picture is; he at least would know, irrespective of any contracts, whether the second-run was run the next year. I am not speaking about the terms of the contract, whether that provides for the run, but we are inquiring about the fact of what was done.

Mr. Clagett: These cover the fact of the change.

The Court: Did you run the second run of R.K.O. and Warner the following year, is the question, as I take it.

The Witness: We did not.

By Mr. Clagett:

Q. You had a subsequent run for that season?

A. Yes, sir.

Q. Behind what houses?

A. Behind four Schine houses.

Q. Can you state the length of the period of clearance?

The Court: Well, I think the contract ought to show that, that is an answer to the question, as I understood, he answered what they ran, whether they did run second-run pictures. If he is to answer further than that, the second-run with Warner, the contract is the best evidence of the [fol. 2235] pictures.

Mr. Clagett: I would like to offer those contracts now for identification. I do have certain of the contracts here, not Mr. Fenybessy's contracts, other contracts which we want to offer from the major distributors.

Mr. McClennen: Well, if there is a contract here that looks all right, you can put it in evidence now without any identification, if you will tell us which ones you want. We have been looking through to check them.

Mr. Clagett: I am going to offer all of those contracts that I gave you. Let me have the Warner ones first. Could I have the whole series of Warner contracts?

Mr. McClennen: Well, as fast as we check them.

The Court: We will suspend for five minutes and you can get them together.

(Short Recess.)

(During the recess, by agreement between counsel, the reporter marked a series of contracts as Plaintiff's Exhibits Nos. 720 to 749, inclusive, in evidence.)

Mr. McClennen: These exhibits, 720 to 749, if your Honor please, are ones that were handed to us by Mr. Clagett this [fol. 2236] morning as those that hadn't got into the distributors' groups, that they brought here that have been the subject of testimony before and to save the double operation we have conceded that they are distributors' copies and all appear to be executed copies.

Mr. Clagett: We still have got some others to mark. We have some of the exhibitors' copies that haven't been marked nor previously identified. We might let that pass until the noon recess and have them marked then.

Mr. McClennen: Well, Mr. Clagett, as to those, those are already marked for identification.

Mr. Clagett: That is true. He has to mark the identification off.

Mr. McClennen: That can be done at any time. Can't you read them into the record so we will know what they are?

The Court: Are you consenting to that?

Mr. McClennen: We could do that in the recess, also.

The Court: It will save time.

Mr. Clagett: I would prefer to offer these just after lunch, because they seem to be a little bit out of order at the moment.

[fol. 2237] By Mr. Clagett:

Q. Mr. Fenybessy, calling your attention again to the 1932-33 motion picture season, and with respect to the Madison Theatre, can you state the number of days that you played pictures at the Madison Theatre behind the Schine theatre that you have referred to?

A. R.K.O.?

Q. R.K.O. and Warner, let me ask you for Warner first.

A. They played Sunday, Monday and Tuesday at two Schine houses; then the following Sunday, Monday and Tuesday at two more Schine houses.

Q. And then were available for the Madison?

A. And then there was a Sunday in between, and they were available for Madison.

The Court: You mean the third week?

The Witness: The fourth Sunday they could be played; one Sunday intervened.

Q. Was that true, Mr. Fenybessy in 1932-33 season?

A. I think so.

By the Court:

Q. Did that apply to all Warner pictures, do you mean?

A. Yes, all Warner pictures, feature pictures.

Q. How about the Warner, the first half of the week, is that the way it worked out, Schine, I mean?

A. They played Sunday to Tuesday on one picture; that [fol. 2238] same picture was played in two other houses by them on the following Sunday to Tuesday, and then there was a Sunday to Tuesday skip, and the following Sunday to Tuesday they were available to us.

Q. I am inquiring about the balance of the week, that is all.

A. The balance of the week, something else was used, but not necessarily Warner.

Q. Was there always two days elapsed between the first-run and second-run at the different theatres?

A. There was in many cases and in this case there was. It all depends on the clearance.

By Mr. Clagett:

Q. I want to call your attention, Mr. Fenybessy, to two Warner contracts, that is, a Warner Brothers contract and a First National product contract which has been marked as Plaintiff's Exhibits 724 and 725, dated approved November 20th, 1933, and ask you if the provision relating to clearance would refresh your recollection as to what the clearance was, in the 1932-33 or 1933-34 seasons?

Mr. McClennen: The contract is for the 1933-34 season, isn't it?

Mr. Claggtt: The next one, I am missing that contract, but this contract would, I think, refresh his recollection on [fol. 2239] both those years, the preceding year as well as this.

The Court: You said "or," you mean "and," don't you? You said "or" in the question.

Mr. Clagett: "And," yes.

The Witness: Do you want me to read the clearance?

The Court: You can state what it is from the contract.

The Witness: After the Schine protection had cleared the Webster, a seven days' clearance on subsequent runs, and to follow Schine's Liberty, State and Dixie, and the pictures were to be available for the Strand, Madison and our Monroe 14 days after the first booking in any of these other houses.

Q. With that refreshing your recollection, indicating that the period of clearance in the 1932-33 and 1933-34 seasons, on the Warner product at the Madison Theatre, was 14

days after the first booking in the Schine house rather than 21 days——

The Court: Isn't the 1932-33 contract here?

Mr. Clagett: I don't have that, but I am asking the question whether the reference to this contract for 1933-34 would refresh his recollection as to the clearance for both seasons, the number of days he played behind the first [fol. 2240] Schine house.

The Court: Where is the 1932-33 contract?

Mr. Clagett: I don't have it.

Mr. McClennen: What is this right here?

Mr. Clagett: With reference to the 1932-33 contract, which has been marked—contracts for the First National product and Warner Brothers product, which have been marked as Plaintiff's Exhibits 722 and 723, I would like to read the provisions with reference to clearance, "To follow Riviera, Liberty, State and Webster Theatres' protection."

The Court: What is that word?

Mr. Clagett: "Protection." The same provision appears on both contracts.

[fol. 2241] The Court: Does it state the time?

Mr. Clagett: It does not state the number of days or any time.

The Court: What does that mean in connection with the industry, "protection"? What does it mean as to time?

The Witness: In this case it meant whatever the customary clearance or protection was that was awarded to the Schine houses. If they had fourteen days then these people would give us fourteen days.

The Court: That is what I wanted to find out. It relates to the custom there.

The Witness: The custom that season, whatever they had on other major product.

By Mr. Clagett:

Q. Did you play pictures at the Madison Theatre, 1932-1933, for the 1932-1933 season, a lesser number of days after the Schine houses than you played in the 1933-1934 season?

A. I think so.

Mr. Clagett: Strike that out.

Q. Did you play pictures in the Madison Theatre, Warner

pictures, for the 1932-1933 season a greater number of days after the Schine houses than you did in 1933-1934?

[fol. 2242] Mr. McClennen: That is objected to. Let the witness state, I submit, how long after the Schine houses he played in the one year, as a matter of fact. Of course, when he played is determined by when he books them in, among other things.

The Court: How long he plays and how many he plays. He may state the number he played.

Mr. Clagett: No, your Honor, the number of days after.

The Court: All right.

By Mr. Clagett:

Q. Did he play the pictures a greater number of days after the Schine houses in 1932-1933 than you did in 1933-1934?

Mr. McClennen: That is what I am objecting to. If he will state what it was in the one year——

The Court: Yes. You may state that. What was the protection period? I think that already appears.

A. Well, whatever appeared on the contract. I can't remember off-hand, but I didn't get any better delivery, availability, than the contract specified, and I could play the pictures when they were available, and they were available after Schine played them in four theatres and the number of days as indicated in the contract. If it was 14 days, then I got them 14 days, excepting if it was a percentage picture, in which the distributor demanded a Sun-

[fol. 2243] day, because of his participations, then I had to play it on a Sunday, and in that case it was a longer period.

Q. Sometimes clearance was specified and the number of days in the contract and sometimes it was not; is that right?

A. That is right.

Mr. McClennen: In the reading this 14 days just spoken of is not 14 days of clearance. It is 14 days from first booking, which might have no clearance.

By Mr. Clagett:

Q. You testified, I believe, that you acquired the Monroe Theatre in 1933?

A. Yes, sir.

Q. Will you state now with respect to both the Madison and the Monroe theatres, whether from the 1933-1934 season until you sold these theatres to Schine in 1939, whether you played the pictures at those theatres a greater number of days after the Schine houses in 1938 and 1939 than you did in 1933 and 1934?

Mr. McClennen: That is objected to.

The Court: You mean by the greater number of days the greater length of clearance?

Mr. Clagett: That is what I am trying to get at.

[fol. 2244] The Court: The contracts are here, are they not?

Mr. Clagett: I simply want to indicate from this witness in a general way what the clearance on the picture was, calling his attention to the days after or the increase in the days after the Schine houses when his houses played the pictures.

Mr. McClennen: There was not a general picture. The contracts show a specific picture in respect to this matter, and it is important, if the subject be gone into at all, that it be gone into by the contracts.

The Court: Are the contracts for those years in evidence here?

Mr. Clagett: Not all of the contracts. I haven't been able to get all of them, but there are a number of contracts and I think undoubtedly they show very clearly what the clearance provisions and run situation was.

Mr. McClennen: They are in the group which I think has heretofore been identified. This is just a supplementary one that we were handed this morning, but they can be readily taken from that group of identified contracts. In the case of some of the distributors, those just marked this [fol. 2245] morning give later dates as well as these years from 1932 to 1935.

By Mr. Clagett:

Q. I call your attention to a contract for the Monroe Theatre for the 1935-1936 season, with RKO, which has been marked as Plaintiff's Exhibit No. 731, and ask you whether this refreshes your recollection as to the number of days after the Schine houses that you played the RKO pictures in that season?

Mr. McClennen: Can't you read it right in yourself?

Mr. Clagett: I will. I will adopt that suggestion. The clearance provision in the contract in question which I have just referred to is as follows: "Pictures to be played 21 days after Riviera. Pictures to be dated within 14 days of availability, open booking with the Webster Theatre, 7 days clearance on subsequent runs."

Mr. McClennen: If your Honor please, what I had reference to is that this picks one theatre, the Riviera. This 21 days was based on the one theatre, the Riviera, and not the four theatres. The 21 days might be less than the 14, or it might be more.

[fol. 2246] The Court: The contract shows for itself, doesn't it?

Mr. McClennen: The contract speaks for itself.

By Mr. Clagett:

Q. In the period 1932-1933 did Schine operate the Webster Theatre?

A. I don't think so.

Q. Did they operate it in the year preceding that?

A. I think so. I am not sure.

Q. Did the Webster Theatre take clearance over the Madison Theatre?

A. No.

Q. It never did?

A. Under Schine it did.

Q. That was my question. You say under Schine it did?

A. When Schine operated it it did.

Q. After Schine relinquished the theatre did it take clearance over your theatre, the Monroe?

A. No.

Q. Or did you take clearance over the Webster?

A. We took clearance over the Webster.

Q. Did the Dixie Theatre, prior to the time it was acquired by Schine?

The Court: You knew about it before Schine took it over?

The Witness: Yes.

Q. What was the run of the Dixie at that time with [fol. 2247] reference to the Madison? Was it ahead of the Madison or did you play ahead of the Dixie?

A. We played ahead of the Dixie.

Q. After Schine acquired the Dixie did the Dixie play ahead of the Madison and Monroe or did you play after the Dixie?

A. We played after the Dixie.

Q. Can you state whether you succeeded in licensing a second-run of Columbia pictures about 1936 and 1937?

A. Yes, sir.

Q. And did you license the same part on the second-run also for the following season?

A. Yes, sir.

The Court: Are there a number of these that are not already in evidence?

Mr. Clagett: Will you give this the next exhibit number?

The Court: Are there a number of them?

Mr. Clagett: Just two right now.

(The license agreement with Columbia Pictures Corporation, 6-14-37, referred to, was marked as Plaintiff's Exhibit 750 for identification.)

(The license agreement with Columbia Pictures Corporation, 10-27-36, referred to, was marked as Plaintiff's Exhibit 751 for identification.)

[fol. 2248] The Court: We will take a recess now.

(Reporters' Note: Change page 2130, line 21, "The Court" to "Mr. Wright".)

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 2249] After Recess, 2 o'clock P. M.

Appearances: As before noted.

Chester Fenybessy resumed the stand by and on behalf of the Plaintiff and testified further as follows:

Mr. McClennen: Three contracts from the Witness Fenybessy's file are now marked as Plaintiff's Exhibits 752, 753 and 754 in evidence.

(Thereupon three contracts from Witness Fenybessy's file referred to were marked as Plaintiff's Exhibits Nos. 752, 753, 754.)

Mr. McClennen: Two contracts from the Witness Fenybessy's file are now marked in evidence as Plaintiff's Exhibits 755 and 756.

(Thereupon two contracts from the Witness Fenybessy's file referred to were marked as Plaintiff's Exhibits Nos. 755 and 756.)

Mr. McClennen: Contracts identified by numbers out of court at Gloversville are now marked in evidence as follows: Contract formerly marked L-27 is now marked as Plaintiff's Exhibit No. 757 in evidence; contract formerly [fol. 2250] marked as L-28 is now marked as Plaintiff's Exhibit No. 758 in evidence; contract formerly marked L-29 is now marked as Plaintiff's Exhibit No. 759 in evidence; contract formerly marked L-26 is now marked as Plaintiff's Exhibit 760 in evidence; contract formerly marked L-60 is now marked as Plaintiff's Exhibit 761 in evidence; contract formerly marked L-59 is now marked as Plaintiff's Exhibit No. 762 in evidence; contract formerly marked L-58 is now marked as Plaintiff's Exhibit No. 763 in evidence; contract formerly marked L-57 is now marked as Plaintiff's Exhibit No. 764 in evidence.

(Thereupon contracts above referred to were marked as Plaintiff's Exhibits Nos. 757 to 764, inclusive, in evidence.)

(Thereupon a group of letters was then marked as Plaintiff's Exhibits Nos. 765 to 778, inclusive, for identification.)

Mr. McClennen: That correspondence, if your Honor please, as distinguished from the other group, has been marked for identification only. The others are in evidence. They are letters passing between Mr. Fenybessy and [fol. 2251] R. K. O., one way or the other, and between Mr. Fenybessy and some representatives of Loew's. We make the general objection that we have made heretofore to communications of that kind.

The Court: Are they offering them now?

Mr. Clagett: Yes.

The Court: You are offering the letters now?

Mr. Clagett: I will offer those letters now so as to have the exhibits in evidence.

The Court: Those are 765 to 778?

Mr. Clagett: The letters, your Honor, are a series of letters which Mr. Fenybessy has written to the highest officials of the Sales Department of Loew's, Mr. William F. Rogers, General Sales Manager, Mr. J. F. Connors, Division Manager, and Mr. E. K. O'Shea, who was District

Manager, and replies from the same officials at different times, and we offer these in evidence.

The Court: Received. The objection is overruled.

(Thereupon a group of letters previously marked as Plaintiff's Exhibits Nos. 765 to 778, inclusive for identification were received in evidence.)

Mr. Clagett: Your Honor, I want to read, and I don't [fol. 2252] think I will take too much time, I will do it as rapidly as I can, the clearance provisions in these various contracts, referring to the contract, and also identifying the exhibit at the same time; that is, referring to the Company and season, and I want at the same time to ask certain questions of the witness with respect to certain contracts, but I will limit that to as great an extent as possible.

Mr. McClennen: Before you get to that, there was one thing, in having these marked, they have not been described into the record, and we thought if it met with your Honor's approval, that we would, after 4 o'clock this afternoon, read to the stenographer the description, that is, the date and the contract.

Mr. Clagett: That will be simpler, and I will simply refer to the exhibit number here and year.

Mr. Wright: If you are going to read it after 4 o'clock, just read the name of the company and the season, and the rest may not be necessary.

Mr. McClennen: Yes, there is a whole lot he may not refer to.

The Court: You will have an opportunity to identify them on the record.

[fol. 2253] Mr. Clagett: If anything is needed, I think they will be sufficiently identified.

Mr. McClennen: There is one thing further, if your Honor please, a messenger from Bellefontaine is here with the volume of newspapers referred to in the cross-examination of Mr. Mooney, and we have agreed among ourselves, subject to your Honor's approval, that after 4 o'clock, in the same way, we will read in such of those as are wanted into the records, so that the book may go back.

Mr. Wright: We have no objection to making the record in that way at this time, but it should be understood that it doesn't properly go in as part of our case. If it is a matter of convenience, as long as the man is here, all right.

Mr. McClennen: I think there is this to be said with

respect to this. Mr. Mooney testified that whatever figures were in those publications, they were right. Therefore, we think they should go in as part of Mr. Mooney's testimony in cross-examination. That question can be dealt with by your Honor on Monday after we have got the identification of the papers.

[fol. 2254] Mr. Wright: We will object to that. If that was the intention I think it should have been produced during the cross-examination; but of course we have no objection to making a record now of whatever it shows.

Mr. McClennen: We will make the record after your Honor adjourns and take the matter up with your Honor at another time.

Mr. Clagett: Plaintiff's Exhibit 720, contract between Warner Bros. and Mr. Fenybessy for the Madison Theatre, the approval date is July 29, 1931, the clearance provisions read as follows: "Second-run, City of Rochester, N. Y., 30 days after first-run, if any; 7 days protection, day and date with Strand."

The Court: 30 days after the termination of the first-run?

Mr. Clagett: It says 30 days after first-run, if any. 7 days protection.

Mr. McClennen: I think it was so read, but it is apparent, your Honor, that the ten days was the protection which Mr. Fenybessy gets over subsequent runs.

The Court: Seven days protection over subsequent runs?

Mr. McClennen: Over subsequent runs.

[fol. 2255] The Court: Then the clearance period from the first run is thirty days, thirty days after the first-run they run the second-run?

Mr. McClennen: The first run has thirty days protection. Then it goes to him and then nobody else can have it for whatever the number of days says. I thought it was ten.

Mr. Clagett: Exhibit 721, a First National contract for Madison Theatre, approved July 20, 1931, the provisions with respect to protection are the same as the Exhibit 720. I call your Honor's attention to the fact that in certain early seasons Warner Bros. and First National were selling separate contracts for the same theatre, with identical provisions. Subsequently the Company made one contract for all pictures.

The Court: What was the relation between the two companies?

Mr. Wright: Those were merely trade names for the production. They were all sold by Vitagraph, Inc.

By Mr. Clagett:

Q. Mr. Fenyvessy, can you state the provisions, day and date, with the Strand?

[fol. 2256] A. A simultaneous showing with the other house.

Mr. Clagett: Exhibits 722 and 723 are contracts, Warner Bros. productions and First National productions, respectively, for the Madison Theatre. They bear approval date November 14, 1932. The clearance provision is as follows in both exhibits, to follow Riviera, Liberty, State, Webster Theatres protection.

Exhibits 724 and 725, contracts Warner Bros and First National productions, respectively, for exhibition at the Madison Theatre; bear approval date November 20, 1933, provision for clearance is as follows: After Schine protection clear of Webster, seven days clearance on subsequent runs, to follow Schine's Liberty, Riviera, State and Dixie, pictures to be made available for dating at the Strand, Madison or Monroe fourteen days after the first booking in any of the above enumerated houses.

The Court: Just what does that mean, Mr. Witness, as applied to your theatre?

The Witness: Will you read that again? I didn't hear it.

[fol. 2257] Mr. Clagett: "After Schine protection clear of Webster".

By Mr. Clagett:

Q. What does "clear of Webster" mean?

A. "Clear of Webster" means that we played ahead of Webster, but we played after four Schine houses, assuming that at that time there were four houses.

Q. To follow Schine's Riviera, Liberty, State or Dixie, pictures to be made available for dating at the Strand, Madison or Monroe fourteen days after the first booking in any of the above enumerated houses?

A. That meant fourteen days after the first booking in any of those four houses.

Q. Will you state the manner in which Schine operated its four theatres with reference to the theatres that played

first and then the ones that played second and the period between the two?

A. They usually played the Riviera and the other house together and then they followed the next Sunday with two more houses.

Q. And would be available for the Madison Theatre, according to these provisions, fourteen days after the first booking in the Schine house?

A. Providing it was not a percentage picture where the distributor had the right to designate a Sunday.

Q. You mean for your house—for the Madison?—

[fol. 2258] A. Yes.

Q. In that event your clearance might be extended to more than the 14 days?

A. Yes, we had to give them a Sunday. We could not play it any other time than a Sunday.

Mr. Clagett: Exhibit 752, combined contract Warner Bros. and First National for exhibition at the Madison Theatre, bearing approval date October 11, 1935, clearance provision as follows: Clear of Webster Theatre after Schine's protection, to be available for dating 14 days after first booking at any of the following theatres: Schine's Liberty, Riviera, State or Dixie.

Exhibits 753 and 754, Warner Bros. and First National Productions for the 1937-1938 season at the Monroe and Madison Theatres respectively, bearing approval date in each case December 10, 1937, with the following provision with respect to clearance: After Schine clearance clear of Webster Theatre, seven days and subsequent runs of Rochester.

The Court: Subsequent runs anywhere else?

[fol. 2259] The Witness: Yes.

Mr. Clagett: This exhibit that I have is for the 1937-1938 season.

By Mr. Clagett:

Q. Mr. Fenyvessy, do you recall whether you played the Warner Pictures for the 1938-1939 season, which was, I believe, the last season before you sold out?

A. Yes, I think we did.

Q. With reference to the 1938-1939 season, was your run the same as it was for the 1937 and 1938 season?

Mr. McClennen: That I object to. We ought to have the contract stating the terms, as we have had it for the others.

The Court: Have you got the contract here?

Mr. Clagett: There are numerous contracts and I cannot recall now specifically in a given case—there are gaps here—whether we did not select those contracts or whether they were not furnished either by Schine in response to the subpoenas served upon them or by the distributors in response to the subpoenas served upon them.

The Court: Just read that question.

Mr. Clagett: It is my impression that most of these gaps [fol. 2260] are the result of contracts which were not furnished in response to the subpoena which we served upon the distributors.

The Court: Just read that question.

(Last question read.)

The Court: You mean your run which is under the same contract or agreement? Is that what you mean?

By Mr. Clagett:

Q. Were the terms with respect to clearance the same in the contract which you had for the 1937-1938 season?

Mr. McClennen: Now, if your Honor please, these latter contracts have been produced by Mr. Fenyvessy from his files and we ought to have them.

The Court: Objection sustained to the question in the form in which it is put. You have not shown that the contract is lost.

By Mr. Clagett:

Q. Did you follow the Schine houses?

A. Yes, sir.

Q. Did you follow the Schine houses by the same number of days as in the preceding season?

Mr. McClennen: That is objected to. That again is asking for the contents of a contract. It is perfectly simple [fol. 2261] to have the contract tell the story.

The Court: Ask him whether it has the same terms. If the contract is lost and cannot be found after making a search you can make proof of its contents. Objection sustained.

Mr. Wright: If the Court please, we would like, of course, to have all of these contracts. These gaps are not of our choosing. We asked for the entire period. This is all they were able to find. We asked Mr. Fenyvessy to bring all his contracts and he was not able to supply the interval there. Quite apart from the clearance provisions I take it it is always competent for him to state the position in which he played the product of a particular company.

The Court: He has already stated that.

Mr. Wright: Yes, that he followed the Schine houses. I understood that stayed in.

The Court: This is the question of clearance dates in two years.

Mr. McClennen: Of course the Schine files would not have the Fenyvessy contracts. There is nothing to indicate that this contract that is spoken of is not among the papers produced.

The Court: I will sustain the objection.

[fol. 2262] Mr. Clagett: That completes the Warner First National contracts.

These are R.K.O. contracts, Plaintiff's Exhibits 726 and 727, with R.K.O. Distributing Corporation for the exhibition of feature pictures at the Madison Theatre, and both exhibits bearing approval date January 15th, 1931. The clearance provision is as follows: "Day and date with Strand."

Mr. McClennen: If your Honor please, in this matter of contracts for the season 1938-39, this morning we furnished to Plaintiff's counsel from our files certain contracts which were turned back to us. One of those is Plaintiff's Exhibit C-160 for identification, which shows the terms of the contract for the 1938-1939, placing the Riviera, Liberty, State, Dixie, Grand, Cameo and Lake behind the Fenyvessy theatres, Strand, Madison and Monroe.

Mr. Clagett: Those are some Columbia contracts he refers to. I was talking about Warner. We will come to Columbia. In addition, those are contracts for special [fol. 2263] features and duplicated by the contract for the main season's product.

Mr. McClennen: The question put to the witness was a general one, not confined to Warner.

The Court: He is talking about Warner. He has stated that was the subject matter of this period of the examination.

Mr. Clagett: With reference to these Plaintiff's Exhibits 726 and 727, Mr. Fennessy, what is the provision for run "Day and date with Strand", what does that indicate or mean?

The Witness: R.K.O.

Q. This is R.K.O. "Day and date with Strand"?

A. It meant that we had second-run.

The Court: What is that?

The Witness: It meant that we had second-run.

Q. It meant second-run, and provided you had second-run after the Strand?

A. Yes, we had second-run at the Strand.

Mr. McClennen: Not after Strand, it meant second-run at the Strand.

The Court: That meant both?

The Witness: Yes, a simultaneous showing.

Mr. Clagett: Exhibit 728 is a contract with R.K.O. Distributing Corporation for exhibition of feature pictures [fol. 2264] at the strand and Madison, bearing approval date September 28th, 1932, with clearance provision as follows: "To follow Riviera and State and Webster where they are to play within ten days of each other. In event they are not played within ten days, Strand and Madison are to have immediate availability; seven days protection to be granted the Strand and Madison. Any pictures played second-run at the Temple Theatre are to be delivered at $50 less than the contract price. Total contract price for the 16 features, $9600, which includes score."

The Court: Was the Temple owned by you?

The Witness: No, it wasn't owned by us. It was an opposition house. It was then owned, as always, by R.K.O.

By Mr. Clagett:

Q. Does that mean that if a picture played at the Temple Theatre you had a reduction in the film rental because of the additional prior run?

A. Yes, downtown.

Mr. Clagett: "Riviera, State and Webster to have ten days protection after which period pictures shall be available to Strand and Madison".

[fol. 2265] Exhibits 729 and 730, contracts with R.K.O. Distributing Corporation for exhibition of feature pictures

at the Madison and Monroe Theatres, respectively, both bearing approval date December 8th, 1933, with the clearance provision as follows: "Pictures to play after the State, Riviera, Liberty and Dixie Theatres, to be available 14 days after the Riviera date and to be played within 14 days of availability. The exhibitor shall be entitled only to such feature pictures released by the distributor during the 1933-34 season as shall be identified by production numbers running from 4102 to 4152, ahead of second-run theatres seven days.

Exhibits 731 and 732, contracts with R.K.O. Distributing Corporation for the exhibition of feature pictures at the Madison and Monroe Theatres respectively, and Exhibit 731 bearing approval date January 25th, 1935, and exhibit 732 does not appear to have an approval stamp, but the application dated January 16th, 1935, which is the same application date as the contract on the Monroe, Exhibit 731, [fol. 2266] and clearance provision as follows: "Pictures to be played 21 days after Riviera. Pictures to be dated within 14 days of availability, open booking with the Webster Theatre, 7 days clearance on subsequent runs."

Q. With reference to the provision "Picture to be played within 21 days after Riviera," Mr. Fenybessy, can you state in what period of time the Liberty, State and Dixie Theatres would be played after the Riviera?

A. If they were Sunday pictures, the next Sunday.

Q. All three theatres that I mentioned?

A. At two theatres at a time. I didn't understand you to say three.

Q. No, my question was with reference to the provision "Pictures to be played 21 days after Riviera," what would be the period in which the pictures were to be played by the Liberty and by the State and Dixie?

A. They would play the next Sunday at the other two Schine houses.

The Court: How would that make any difference, 21 days after the Riviera, the dates would be fixed from the Riviera alone?

Mr. Clagett: That is the point I want to clarify, this only mentions the Riviera and does not mention the Liberty, [fol. 2267] State or Dixie.

The witness: Well, I believe they were played at another house or a pair of houses each Sunday.

Q. Would the Madison and Monroe for the 1934-35 season, follow the Riviera, the Liberty, Dixie and State?

A. They would.

Q. The next exhibit is P-55 and P-56, contracts with R.K.O. Distributing Corporation for the exhibition of feature pictures at the Madison and Monroe Theatres, respectively, each exhibit bearing the approval date December 7th, 1936, with the clearance provision as follows: "After Schine clearance as granted by all major companies, clear on Webster Theatre 7 days ahead of all subsequent-runs in City of Rochester."

Mr. McClennen: What are the number of those, Mr. Clagett, please?

Mr. Clagett: These are exhibits 755 and 756.

Q. Can you recall, Mr. Fenybessy, whether you used the R.K.O. pictures in the Madison and Monroe Theatres following the Schine houses for seasons following 1936-37?

A. Yes, sir.

Q. Can you state whether you played after the Schine houses?

A. Yes, we played after them.

Mr. Clagett: The next exhibit numbers relate to Loew's, Inc., Exhibit 737 and 738, license contracts for the 1934-35 [fol. 2268] season, for the exhibition at Monroe and Madison Theatres, respectively, each exhibit bearing approval date November 28th, 1934 and clearance provision as follows: "Open booking with Webster Theatre, Rochester, New York, available after Capitol Theatre, Rochester, New York; available immediately after Capitol Theatre, Rochester, New York; if and as available seven days clearance on all subsequent-runs. If played within 14 days all availability or clearance waived."

The Court: What was the clearance given Schine, what does that mean? The Capitol was owned by Schine, wasn't it, is that the one you are speaking about?

Mr. Clagett: No, your Honor, the Capitol was one of the downtown theatres which was described this morning as a second-run or continued-run house.

The Court: You just read from the exhibit. It doesn't state the clearance given Schine or when it could play with reference to the Schine house.

Q. It does, except, Mr. Fenybessy, what does the pro-
[fol. 2269] vision "Open booking with Webster" mean?

A. Day and date, simultaneous with Webster.

Q. Do you recall at that time whether the Webster Theatre was second-run following the Schine houses?

Mr. McClennen: What is the date?

Mr. Clagett: In the 1934-35 season.

The Witness: No, I can't recall.

Q. You don't recall that?

A. No.

By the Court:

Q. In other words, was your run subsequent to Schine?

A. Well, I think it was, although I really can't tell from that contract, on the clearance. The Schine contract will show what ours was.

Q. I know, but there should be something in your contract to show the relation to the Schine Circuit.

A. Well, it only shows——

Q. Open date with Webster, that means the two simultaneous?

A. Yes, we could play it at the same time Webster was playing. We could follow the Capitol, but where Schine was playing, I don't know, but Schine's contract would show whether he was playing ahead of the Capitol.

Q. You have to find out what the Webster clearance was against Schine?

A. Yes, but I think you should find out what Schine's
[fol. 2270] clearance was.

Q. The contract don't tell us, it says "Open date," with another theatre, Webster.

A. They anticipated selling the Capitol Theatre at that time, and never did. Having that in mind they made their contract that way.

Mr. Clagett: I am going to read from the Schine 1934-35 contract at this point, a little out of sequence as to exhibit numbers, but I think that will clarify the matter. Exhibit No. 760, an exhibition contract between Loew's, Inc., between Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for the exhibition of feature pictures at the Riviera or Liberty, bearing approval date October 12th, 1934, clearance provision as follows: "Sec-

ond-run thirty days on Lake, fourteen days on all subsequent-run, Rochester, New York; 45 days after Loew's, Rochester, New York."

[fol. 2271] The Court: I do not know what it means. I do not know whether the two read together mean that the two theatres to which you referred would have first-runs or second-runs or something else.

Mr. Clagett: I think the matter will be clear when I read these other contracts covering the other Schine houses.

The Court: It is pretty hard to follow. I want to call your attention to the fact that the exhibit which I have just read, that is Exhibit 760, was for the Riviera or Liberty second-run.

Do you mean the Riviera and Liberty, both of them, second-run?

Mr. Clagett: I assume both or either second-run.

The Court: Who had the first-run?

Mr. Clagett: On Loew's product the testimony was this morning that Loew's Rochester Theatre had the first-run down-town. This is the first neighborhood run or the second-run, strictly speaking.

Exhibit 757, contract between Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for [fol. 2272] the 1933-1934 season, bearing approval date October 11, 1934, for the Liberty Theatre, clearance provision as follows: Third-run after Riviera, second-run to be played within 21 days clearance or run waived.

The next contract is Plaintiff's Exhibit 758, between Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for exhibition of feature pictures at the Dixie or State Theatres; approval date October 11, 1934. Clearance provisions as follows: Run second, 14 days ahead of Hudson, Astor, Hub-Sea Breeze, may be played day and date second-run or within ten days of Riviera or Liberty second-run. Must be played within 21 days Riviera or Liberty clearance.

The Court: Does that mean the first-run was obtained by Metro for its theatre and this applies only to second or third runs?

Mr. Clagett: The testimony already in the record is that the Metro-Goldwyn-Mayer Pictures were played first-run [fol. 2273] in their own theatre down town in Rochester.

The Court: Which one is that?

Mr. Clagett: Loew's Rochester. The next exhibit, 759, contract, 1934-35 season, between Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for the exhibition of feature pictures at the State or Dixie, bearing approval date October 11, 1934; clearance provisions as follows: Third-run to be played within the 21 days clearance or run waived, immediately after State or Dixie, Riviera or Liberty second-run, 14 days on Webster Theatre.

The next exhibit numbers are Plaintiff's Exhibits 739 and 740, contracts 1935-1936 season, Loew's for the exhibition of feature pictures at the Madison and Monroe Theatres, respectively, both exhibits bearing approval date October 11, 1935, with the clearance provisions as follows: 14 days after State or Dixie third-run if and as available, State or Dixie must play within 14 days of second-run or their clearance waived, four days ahead of Webster, seven [fol. 2274] days clearance of all subsequent runs if played within fourteen days of availability or clearance waived.

The next exhibit numbers are Plaintiff's Exhibits 741 and 742, Metro-Goldwyn-Mayer contracts for the exhibition of feature pictures at the Madison and Monroe Theatres, respectively, each exhibit bearing approval date June 23, 1938, season 1937-1938; clearance provisions as follows: Run subsequent 14 days after State or Dixie, third-run if and as available, State and Dixie must play within 14 days of second-run or their clearance waived, four days ahead of Webster, seven days clearance on all other subsequent runs if played within fourteen days of availability or clearance waived.

By Mr. Clagett:

Q. Mr. Fenyvessy, with reference to the contracts that I have just read from, Exhibits 741 and 742, for the 1937 and 1938 seasons, and referring to the previous exhibits, 739 and 740, for the 1935-1936 season, can you state whether [fol. 2275] the Madison and Monroe theatres used the product of Metro-Goldwyn-Mayer in the 1936-1937 season?

A. Yes.

Q. Did the Madison and Monroe theatres in that season play behind the Schine theatres?

A. Yes, sir.

Mr. Clagett: The next exhibits are Nos. 743 and 744, contracts, Metro-Goldwyn-Mayer pictures, for the exhibition of feature pictures at the Madison and Monroe theatres, respectively, both exhibits bearing approval date June 23, 1938. Clearance provisions as follows: 14 days after State or Dixie, third-run if and as available, State or Dixie must play within 14 days of second-run or their clearance waived; four days ahead of Webster, seven days clearance on all other subsequent runs if played within 14 days of availability or clearance waived.

By Mr. Clagett:

Q. Mr. Fenyvessy, the 1938-1939 season was the last season for which you bought any product for the Madison [fol. 2276] and Monroe Theatres?

A. That is right.

Mr. Clagett: I now read the clearance provisions in certain Schine contracts for the 1935-1936 season, beginning with Exhibit 764, contract between Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for the exhibition of feature pictures at the Riviera or Liberty, bearing approval date July 26, 1935. Clearance provisions as follows: Runs, second, thirty days on Lake, 14 days on all subsequent in Rochester, New York; 45 days after Loew's, Rochester, N. Y.

The next number is Exhibit 763, contract between Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for the exhibition of feature pictures at the Liberty Theatre, bearing approval date July 26, 1935. The clearance provisions as follows: Run, third, after Riviera second-run, to be played within 21 days clearance or run waived.

The next exhibit is No. 762, contract 1935-1936 season, [fol. 2277] Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for exhibition of features at the State or Dixie, bearing approval date July 26, 1935. Clearance provisions as follows: Run, second, 14 days ahead of Hudson, Astor, Hub-Seabreeze, may be played day and date second-run or within ten days of Riviera or Liberty second-run. Must be played within 21 days Riviera or Liberty or clearance waived.

The next exhibit is Plaintiff's Exhibit 761, contract for the 1935-1936 season between Metro-Goldwyn-Mayer Distributing Corporation and Schine Theatrical Co., Inc., for exhibition of feature pictures at the State or Dixie theatres, bearing approval date July 25, 1936. Provisions with reference to clearance: Run, third, immediately after State or Dixie, Riviera or Liberty second-run, 14 days on Webster Theatre, to be played within 21 days clearance or run waived.

[fol. 2278] I think I should call your Honor's attention to the fact that this last season for the Metro-Goldwyn-Mayer product for the Schine theatres was 1935-1936, and Plaintiff's Exhibit—I think it is only marked now for identification—covers the Metro-Goldwyn-Mayer or Loew's—Schine franchise beginning with the 1936-1937 season for four years, which will be in evidence, if it is not already in evidence, and will complete the Government's evidence with reference to the clearance provisions on the Metro-Goldwyn-Mayer-Schine contracts.

The next exhibits relate to Paramount contracts. Exhibit 733, contract between Paramount-Publix Corporation and Mr. Chester Fenyvessy for the exhibition of feature pictures at the Madison Theatre. This exhibit does not seem to bear an approved date, but the application is dated December 11, 1931.

The Court: You said that was between whom?

Mr. Clagett: For exhibition of feature pictures at the Madison Theatre between Paramount and Fenyvessy. [fol. 2279] Clearance provisions as follows: Run, fifth-run, day and date with Strand Theatre, to follow Riviera or Liberty and State or Webster Theatres.

The next exhibit is 734, contract between Paramount Pictures Distributing Corporation and Chester Fenyvessy for the exhibition of features at the Madison Theatre, bearing application date March 2, 1933. Clearance provisions as follows: Day and date with Strand Theatre, after Temple Theatre, to follow Riviera or Liberty and State or Webster Theatres.

The next number is Exhibit 735, contract Paramount Pictures Distributing Corporation, for exhibition of feature pictures at the Monroe Theatre, bearing application date October 29, 1934. Clearance provisions as follows: Fourteen days following Schine's Rochester run, seven days ahead of Webster Theatre.

Exhibit 736, contract Paramount Pictures Distributing Corporation for exhibition of feature pictures at the Madison Theatre, bearing application date October 29, 1934. [fol. 2280] Clearance provisions as follows: Fourteen days following Schine's Rochester run, seven days ahead of Webster Theatre.

By Mr. Clagett:

Q. Mr. Fenyvessy, can you state whether you used the Paramount-Publix pictures for the Madison and Monroe Theatres following the 1934-1935 seasons up until you sold out?

A. Yes, sir.

Q. Did the Madison and Monroe theatres follow the Schine theatres?

Mr. McClennen: Are not the contracts here?

A. Yes, they followed.

Mr. Clagett: I just want to show that he did have this and the Madison and Monroe theatres did follow the Schine's Riviera, Liberty, State and Dixie.

The Court: Do you have the contracts here?

Mr. Clagett: I do not have them.

Mr. Wright: If the Court please, the witness is certainly competent to state when his theatre played the pictures with reference to the other theatres. The provisions would be only found in the contract but he can state that his [fol. 2281] theatre did follow the other theatres in playing the pictures.

The Court: I will let him state whether as a matter of fact it did follow.

Mr. McClennen: Is there anything to show that the Paramount contracts such as were made are not right here?

Mr. Wright: That is about what I was going to say. I misunderstood the situation. I thought that these that Mr. Clagett had selected here were all of those that had been produced in response to the subpoena. There were, however, contracts produced in response to the subpoena which have just now been made available, and which I think have been shown to him and from which he made the selection, and I am now attempting to go through them and pick up all of the seasons that we have, so that we will have as complete a picture as the contracts produced will offer what

the provisions were and what was played during these seasons. However, as I understand it, there are still some seasons for which he had contracts which neither the dis-
[fol. 2282] tributors nor he have been able to locate, and as to those we cannot put a contract in evidence.

Mr. McClennen: While that investigation is being made could we have a check to see that Mr. Fenyvessy did, in fact, have any Loew contract for the 1936-1937 product? On this list furnished us there are contracts all the way from 1934 to 1939 and on this list none for the 1936-1937 product, which makes me wonder whether he did in fact have such a contract.

Mr. Clagett: I asked him what question and he said he did have it.

Mr. McClennen: I thought he might have made an error.

The Court: Is that not included in those which Mr. Wright is searching for now?

Mr. Clagett: It might be, and if the contracts furnished by the distributor were complete the contract would be there.

The Court: Your question related to a question of whether he did or did not play certain pictures in that year; is that not it?

Mr. Clagett: That last question. I just simply wanted to determine whether he continued to play the Paramount
[fol. 2283] Pictures for succeeding seasons and he said yes. Then I asked him if he played behind the Schine houses and there was an objection.

[fol. 2284] Mr. McClennen: The objection is, we ought to make sure that the contracts are not available to show what the terms were.

The Court: Well, I say he may have played behind of his own volition. The contracts will show what the terms were, but he may state what the fact was. Did you play after the Schine t[illegible]re?

The Witness: Yes, sir.

Mr. Clagett: The next exhibit is No. 745, Fox Film Corporation, for the exhibition of feature pictures at the Madison Theatre, bearing application date October 2nd, 1932.

The Court: 1932?

Mr. Clagett: 1932, clearance provisions as follows: "After first-runs and Riviera, Liberty, State, Webster, and ahead of other subsequent-run houses in Rochester; if played when available, with Strand."

The next number is 746, a contract with Fox Film Corporation for the exhibition of feature pictures at the Madison Theatre, bearing application date August 18th, 1933; clearance provision as follows: "After Riviera, Liberty, [fol. 2285] State, Webster, Dixie, seven days clearance, balance Rochester neighborhood theatres, if played when available. Play arrangement November, 1933, four and one-half per month as available."

The next is Exhibit No. 747, contract with Fox Film Corporation for the exhibition of feature pictures at the Monroe, bearing application date August 18th, 1933; clearance provisions "After Riviera, Liberty, State, Webster, Dixie; seven days clear balance Rochester neighborhood theatres if played when available. Playing arrangement November, 1933, four and one-half per month as available."

The next is Exhibit 748, and 749, exhibition contracts, Fox Film Corporation, for the exhibition of features at the Madison and Monroe, respectively, each bearing approval date March 20th, 1935; clearance provisions as follows: "As available after Riviera, Liberty, State, Dixie, Capitol; open booking with Webster, ahead remaining subsequent-run houses, Rochester, if played when available, commenc- [fol. 2286] ing March 10th, 1935, to be played one per week as available."

The Court: Fox has no theatres of its own in Rochester?

Mr. Clagett: None that I know of.

Q. Mr. Fenybessy, I show you Plaintiff's Exhibits 750 and 751 and ask you,—contracts with Columbia Corporation,—and ask you what run of pictures you had for the 1936-37 and 1937-38 seasons?

Mr. McClennen: Isn't that stated right in the contract? Well, then, I object. Read the contract as you have been doing with the others.

The Court: If it is specified, it is unnecessary to read them, unless there is some purpose to be served.

Mr. Clagett: Exhibit 750 and 751 are contracts with Columbia Pictures Corporation for the exhibition of feature pictures. Exhibit 750 is for the Monroe Theatre. Exhibit 751 is for exhibition at the Madison Theatre. Exhibit 750 bears an approved date June 18th, 1937, and Exhibit No. 751 an approved date November 6th, 1936. With reference to Exhibit 751, clearance as follows: "Second-run, City

of Rochester, New York." Clearance provisions of Exhibit 750, "Second-run City of New York, fourteen days [fol. 2287] clearance over all sub-runs."

Q. And I ask you, Mr. Fenybessy, whether you had the second-run of Columbia pictures for the 1936-37 and 1937-38 seasons?

A. Yes, sir.

Q. Did you attempt to negotiate a contract with Columbia for those pictures second-run for the 1938-39 season?

A. Yes, sir.

Q. With whom did you have any negotiations or conversation with respect to the Columbia part for 1938-39 season?

A. A salesman by the name of Bullwinkel.

The Court: Who?

The Witness: A salesman named Bullwinkel.

The Court: Rochester?

The Witness: Yes, he represented them at Rochester.

By Mr. Clagett:

Q. From what office did he work?

A. Buffalo.

Q. Had you had previous dealings with him?

A. Yes, sir, many years.

Q. What did Mr. Bullwinkel say with reference to licensing to you the Columbia product second-run for the 1938-39 season?

Mr. McClennen: That is objected to, if your Honor please.

The Court: I will receive it at this time.

[fol. 2288] The Witness: Well, that we could not have it. I don't remember verbatim what he said, but he refused to give it to us.

Q. You did attempt to license that product?

A. Yes sir.

Mr. McClennen: That is objected to.

The Court: That is leading, strike it out. What is that name?

The Witness: Bullwinkel.

By Mr. Clagett:

Q. Did you succeed in licensing any Columbia product second-run for the 1938-39 season?

A. No.

The Court: He was local for Fox?

The Witness: No, he was local for Columbia.

Q. Mr. Fenybessy, you have testified, and I believe the various exhibits referred to indicate that you had a run of the Metro-Goldwyn-Mayer product after the Schine houses from about 1933 or 4 to about 1935 and 6?

A. That is right.

Q. Did you make efforts with reference to licensing a better availability or an earlier run of product from Loew's, Inc., or Metro-Goldwyn-Mayer?

A. Every season.

The Court: What?

[fol. 2289] The Witness: Every season we made efforts.

Q. I call your attention to a series of letters between yourself and Metro-Goldwyn-Mayer, letters which you received from Metro-Goldwyn-Mayer, various dates, from April 9th, 1937, to October 26th, 1938, and bearing exhibit numbers as Plaintiff's Exhibits for identification——

The Court: No, they were afterwards received in evidence.

Mr. McClennen: Those were received in evidence.

The Court: Yes, they were received in evidence.

We agreed to stop at 4 o'clock. I suppose this will take some little time. Those are in evidence.

We will adjourn until 2 o'clock on Monday afternoon.

(Whereupon a recess was taken until Monday, October 9th, 1944, at 2 o'clock.)

[fol. 2290] (After recess in the absence of the Court, the following proceedings took place):

Mr. McClennen: The Daily Examiner, of Bellefontaine, Ohio, in bound volume, for the period December 15th, 1930, to May 29th, 1931, it is stipulated may be used as far as its contents prove admissible without any further formal proof.

The first date from which I shall read is February 11th, 1931. On that date on Page 4, is a large display advertisement of the opening on Thursday, February 12th, at 6 P. M., of Schine's Holland Theatre, showing prices, matinee, children 10 cents and adults 30 cents; nights, children 15

cents, adults 40 cents, show starting daily at 2, 7 and 9 P. M.; matinee every day.

Mr. Wright: I think it should be noted that this refers to a future opening date. These are announced prices for the opening Thursday, February 12th, at 6 P. M.

Mr. McClennen: In the edition of February 11th?

Mr. Wright: Yes.

Mr. McClennen: In the edition of February 17th, 1931, is an advertisement of the Holland; matinee 10 cents and 30 cents; nights 15 cents and 40 cents.

[fol. 2291] In the edition of February 20th, 1931, the Strand Theatre "Tonight and Saturday, new price scale, afternoons 25 cents, evenings and Sunday 30 cents; children any time 10 cents."

There is an advertisement also on the same page of the Holland, but it does not give the admission prices.

Mr. Wright: With the exception of the statement "Potato Matinee Tomorrow Morning at 9:30", which says "Admission for each child five potatoes".

Mr. McClennen: February 21, 1931, Saturday, the Strand advertisement "Prices continuous from 2 o'clock 10 and 30 cents". The advertisement of the Holland does not state the prices.

The edition of February 24th, 1931, the Holland prices are matinee 10 cents and 30 cents, evening 15 cents and 40 cents; the Strand, 10 cents and 30 cents.

On page 3 of the edition of February 25th, 1931, the Strand regular prices, adults 30 cents, kids a dime. The Holland, matinee 10 cents and 30 cents, night 15 cents and 40 cents.

[fol. 2292] February 26th, 1931, the Holland advertises "Today and Tomorrow no advances in prices", setting forth a Gary Cooper and Zane Grey's "Fighting Caravans", a Paramount picture.

The Strand advertisment with a heading "Food for Needy Show, Saturday, 9:30.

The edition of March 2nd, 1931, the Holland, matinee 10 cents and 30 cents, night 15 cents and 40 cents. The Strand advertisement has no statement of prices. At the top it says "Prices, grown-ups 35 cents, kids a dime", with a Joe Brown picture.

Mr. Wright: The title of the picture is "Sit Tight".

Mr. McClennen: March 3, 1931, edition, the Strand, with the same picture, prices 10 cents and 30 cents; the Holland "Usual prices".

The edition of March 5th, 1931, page 6, the Strand with no statement of prices; the Holland with a statement "No advance in prices", with an Eddie Cantor picture.

March 6th, 1931, the Holland, with Eddie Cantor in "Whoopee", and the statement "No Advance in Prices." The Strand prices 10 cents and 30 cents.

[fol. 2293] The edition of March 9, 1931, the Strand prices ten cents and 30 cents. The Holland, with no statement of prices.

The edition of March 10, 1931, the Strand prices ten cents to 30 cents. The Holland, matinee ten cents and 30 cents; nights 15 cents and 40 cents.

The edition of March 11, 1931, the Strand, with no statement of prices. The Holland, matinee ten cents and 30 cents; nights 15 cents and 40 cents.

On March 12, 1931, the Holland has the Paramount picture "Morocco" with the statement "Usual prices". The Strand, early bird matinee Friday, 15 cents, 1.30 to 2 o'clock. Prices otherwise not stated.

On the same page, under the Strand, another small box ad for the Strand, "Early Bird Matinee tomorrow at the Strand, 15 cents from 1:30 to 2 o'clock."

The edition of March 13, 1931, a Holland advertisement, new price policy for Schine's Holland starting Sunday, March 15. Prices: Matinee all seats in balcony 15 cents; [fol. 2294] all seats main floor, 25 cents. Nights, all seats in balcony 25 cents. All seats main floor 40 cents, children all the time 10 cents.

The Strand advertisement of March 13, does not state prices.

The edition of March 14, 1931, the Strand prices, 5:30 to 6:30, 15 cents today; beginning tomorrow continuous from 2 o'clock, prices 10 and 25 cents, bargain matinees starting Monday and until further notice, adults 15 cents, night prices 25 cents. And on the same page the Holland, new price policy for Schine's Holland: All seats in balcony 15 cents. All seats main floor 25 cents. Nights, all seats

in balcony 25 cents, all seats main floor 40 cents. Children all the time ten cents.

And referring back to the edition of February 11, 1931, on the same page, with the opening of the Holland is a display article with pictures of J. Myer Schine and Louis W. Schine under the heading "Schine Bros. have won prominent place in theatre world in fifteen years of accom-
[fol. 2295] plishment", and a leading article entitled "Business to be benefited by new theatre."

In the same edition is a large box advertisement in display type, "The Strand Theatre of Bellefontaine extends greetings to the new Holland Theatre, the picture-going public of Bellefontaine having been given and being accustomed to the best of screen fare will manifest by liberal patronage its approval and appreciation of the same-class entertainment and this assuredly will be afforded them. The Strand Theatre, always a good show, often a great one. Edward A. McAuliffe, Manager."

In the edition of December 27, 1930, is a Strand advertisement, $2.50 worth of tickets, $2.00, an advertising of a two-feature program; no statement of admission prices. The two features are "Oklahoma Cyclone" and "Madonna of the Streets".

[fol. 2296] Mr. McClennen: The advertisement of the Strand in this volume, prior to February 11th, 1931, contain- no statement of prices. There are several repetitions of the advertisement of $2.50 books for $2.00. The Strand advertisement of February 11th, 1931, contains no statement of prices. There is attached to that edition of February 11th, 1931, a display supplement of Schine's Holland Bellefontaine Theatre Beautiful opens Thursday Night, February 12th, 1931, at 6 P.M.

Mr. Wright: The Strand advertised no admission prices on February 12th, and on the 13th there were none advertised, and no admission prices advertised for either the Strand or Holland on the 14th of February; none advertised for the Holland on the 16th, and the strand on that date advertises "For tomorrow and through Thursday afternoon, 10 cents and 30 cents, evenings 10 cents and 35 cents.

Mr. McClennen: That is February 16th, 1931.

Mr. Wright: The 18th shows no admission prices for the Strand and none for the Holland. The 19th shows, at

the Strand, afternoon 10 and 25 cents, evenings 10 and 30 [fol. 2297] cents, and the Holland shows no admission prices.

On the 23rd there is no admission price advertised for the Holland and none for the Strand.

On February 28th, there are no prices for the Holland and the Strand shows the statement "Sunday prices, Adults 30 cents, children 10 cents", which is the only statement as to prices.

On March 4th, 1931, the Strand price is 10 and 30 cents, and for the Holland there is no price stated.

On the 7th no price is stated for the Holland.

Strand prices, Sunday, 10 and 30, otherwise no prices.

On the 16th, Holland, reduced prices, matinee, balcony 15 cents, main floor 25 cents. Nights, balcony 25 cents, main floor 40 cents. Children any time 10 cents.

The Strand advertises prices 25 cents and 10 cents.

May 29, 1931, the Holland shows no prices. The Strand [fol. 2298] has bargain hours, 15 cents Friday, 6:30 to 7:30, Saturday 1:30 to 2:30, 5:30 to 6:30. Special price for children Memorial Day, 5 cents 2 to 6 P.M.

May 14, 1931, the Strand ad says "This complete ad and 25 cents admits two tonight."

And the Holland shows matinee 15 and 25 cents, nights 25 and 40 cents. The kiddies 10 cents.

April 15, 1931, Holland, no prices, Strand, "This ad and 25 cents will admit two adults tonight."

April 1, 1931, the Holland simply states "No advance in prices." The Strand has prices, 10-25 cents.

April 8, 1931, shows the Holland no prices, the Strand prices 10 and 25. "This ad and 25 cents will admit two adults tonight, April 8th."

April 6, 1931, the Holland, no advance in prices. Otherwise no statement. The Strand states no prices.

April 4, 1931, Strand Theatre, for the ladies Vanity [fols. 2299-2301] Ware and watch for announcement. The Strand also advertises a bargain hour from 5:30 to 6:30, 15 cents. The Holland advertises matinee 15 and 25, nights 25 and 40 cents, children always 10 cents.

[fol. 2302] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 9th, 1944, 4 o'clock P.M.

Appearances: Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States. Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevile, Esq., appearing for the Defendants.

[fol. 2303] Proceedings

The Court: Can we accomplish something this afternoon?

Mr. Wright: We have a witness here from the Naval Supply Depot. We promised his commander he would be able to leave this afternoon. I do not think his testimony will take more than 20 or 30 minutes, but he is very anxious to get away and we gave his employer that assurance.

The Court: Very well.

MORRIS KRONICK, a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Kronick?

A. I live at 122 Brookside Avenue, Amsterdam, New York.

Q. What is your occupation?

A. At present I am employed at the Naval Supply Depot, Scotia, New York.

Q. Were you formerly connected with the operation of a [fol. 2304] theatre at Amsterdam?

A. I was.

Q. What theatre?

A. The Orpheum Theatre.

Q. During what period?

A. From July 1st, 1931, until, I believe, in May of 1941.

Q. Now, your theatre was sold at that time to the Schine interests, was it?

A. That is right.

Q. When was the first time that you talked to any one from the Schine Company about the sale of your theatre?

Mr. Rogers: One moment. Might we have the witness' testimony rather than Mr. Wright's conclusion? I would like to get exactly what this witness sold.

The Court: Yes, let the witness testify.

Q. In 1941 what was it you sold to the Schine Company?

A. The good-will of the business of all the equipment, furniture and fixtures.

By the Court:

Q. Did you own the building or lease it?

A. No.

Q. Just sold the lease?

A. I was a tenant.

By Mr. Wright:

[fol. 2305] Q. At that time you had no regular lease?

A. I was a tenant at will.

Q. How much did you receive?

A. The total amount was $7,000.

Q. At that time did you make any agreement with respect to future operation of a theatre in Amsterdam?

A. Yes, I believe there was a clause to the effect that I would not engage——

Mr. Rogers: One moment, may it please the Court, I object to the witness testifying to the contents of a document not in evidence.

The Court: Was there a written agreement?

The Witness: There was.

The Court: The objection is sustained.

Mr. Wright: The agreement was subpoenaed from the Schine Company and they have not produced it.

Q. Did you try to locate a copy of the agreement, yourself, Mr. Kronick?

A. I did, sir, and I haven't got it.

Q. You were unable to find it?

A. All the contracts—it may not be germane to your question, but all my contracts over a period of approximately 10 years, that is to say, contracts, papers, receipts, and so forth, after I sold, were either destroyed or burnt by my wife. When I came back from a trip they were all [fol. 2306] gone.

The Court: Did that include the 1941 contract with Schine?

The Witness: Everything. There was an accumulation of a lot of papers lying around.

Mr. Wright: If Schine will produce the agreement we will be glad to put it in evidence, otherwise I think we will be entitled to have the witness' testimony.

Mr. McClennen: The subpoena has been sent for.

Mr. Wright: The subpoena was returnable in May.

Mr. Rogers: It is my understanding Mr. Kronick's name was never mentioned in that subpoena.

Mr. Wright: That is right, the subpoena called for all agreements you made with any one operating theatres.

Mr. Rogers: That is just the difficulty, if Mr. Kronick had been specifically referred to, we would have made a search.

The Court: Is there any question about the term being in it about his not engaging in business?

Mr. Rogers: I don't know, your Honor. I never saw it.

The Court: This man is here, and strictly the correct way is to await the production of the paper.

Mr. Wright: The response to the subpoena was made that [fol. 2307] it was among the papers produced in New York, but it wasn't produced then. Now, they say they can produce it. We certainly are not prepared for their continuing to say they can produce the documents which they have not produced.

The Court: What is the reason it is not produced?

Mr. McClennen: There was nothing whatever to indicate that this contract was wanted; there was nothing to point it out and we got notice today or yesterday, I think it was, that they wanted this contract.

The Court: How did you get notice today?

Mr. McClennen: From Mr. Wright.

Mr. Wright: If the Court please, we don't know all the parties they made agreements with not to compete, and we probably never will when we get through with the case. Accordingly we subpoenaed a number of documents of that description. A number of them were produced and offered in evidence.

The Court: Are you satisfied to receive this testimony subject to its later being stricken out?

Mr. McClennen: If it is understood that what the witness is stating is the text of the agreement, then if we pro-[fol. 2308] duce the agreement it will be substituted for the witness' testimony, and, if we cannot find it, the witness' testimony will be here.

The Court: Yes.

By Mr. Wright:

Q. Will you state the substance of the agreement then, Mr. Kronick, as near as you can recall it?

A. Well, it was an ordinary contract of purchase and sale.

Mr. Rogers: A little louder, please.

The Court: Speak a little louder.

The Witness: It was an ordinary contract for purchase and sale of all equipment designated in the contract, consisting of two projectors, sound equipment and all appurtenances in the booth, plus all the seats, screen and any other pieces of furniture existent upon the premises.

Q. What, if anything, was said with reference to your future operation of a theatre in Amsterdam?

Mr. McClennen: You mean, said in the contract?

Mr. Wright: Yes.

The Witness: Of course, in the contract was, as was stated to me, the usual clause; that is, purchase and sale [fol. 2309] was made of the usual ordinary business, and the seller agrees not to engage.

Q. I am not asking you about the usual clause. I want to know what your agreement was.

A. That was the clause of the agreement, not to engage in the same line of business in the City of Amsterdam for a period of either five or six years, I do not recall which.

Q. When was the first time you had any conversation with any representative of a Schine Company about selling or disposing of your theatre interests there to them?

A. That would be the year 1937, I believe.

Q. That was when, with reference to the time that they opened the Regent Theatre there?

A. Well, it was some time after the Regent was opened.

Q. And operated by them?

A. And operated by them.

Q. Who did you see on that occasion?

A. I saw Mr. Myer Schine.

Q. Where did you see him?

A. Gloversville, at his office.

Mr. Rogers: Was that at Gloversville?

The Witness: Yes, sir.

By Mr. Wright:

Q. What was the conversation you had then?

[fol. 2310] A. I took up the subject of the operation of my theatre and competition from the Regent.

The Court: The Regent operated by Schine?

The Witness: That is right, and said to him as a practical matter, as business people, we could talk plainly; I felt that the city wasn't large enough to maintain two second-run theatres.

By Mr. Wright:

Q. The policy of——

A. The policy of the Regent was a second-run theatre, and that, under the circumstances "I think something should be done about it". As far as I was concerned, I would be ready to talk a deal.

Q. What did he say?

A. He said he would consider it, but first he asked me what price, if any, I had in mind, and I named a price.

Q. What was the price?

A. $10,000.

The Court: How much?

The Witness: $10,000.

Q. How much had you paid for the theatre?

A. $10,000.

Q. Had you improved it since then?

A. Yes, I improved it several years before that.

[fol. 2311] Q. And what, if anything, did he say to that?

A. He said that it sounded like a considerable amount of money and would like to get a statement from me as to the various equipment that I had in the theatre. I, in turn, said that all we had was the usual two projectors, sound equipment, chairs, screen, and there was nothing special mentioned. He asked me to think it over if I could not consider a lower price, and in the meantime he might see me on occasion if he would be in Amsterdam, and if I would see how the feeling would be among the people that I was tenant of, if they had any ideas about perhaps converting the theatre, or whether they would want to continue it as a going theatre.

Q. Converting it to what?

A. A store.

The Court: Who would want to do that, the owners of the property?

The Witness: No, Mr. Schine and I.

The Court: Talked about the question of converting, you mean?

The Witness: Yes, I had explained to Mr. Schine that originally the premises had been a store, and it had been converted a great many years before into a theatre and the thought was that perhaps they would care to reconvert it [fol. 2312] into a store as it was some years back.

The Court: At that time you had a lease?

The Witness: At that time I was only a tenant at will.

By Mr. Wright:

Q. Do you know whether or not it was converted back to a store after you sold the equipment to Schine?

A. Yes, sir, it was.

Q. When you first began operating it as a theatre in 1931, what other theatres were in operation there?

A. The Rialto and Strand.

Q. Were they both operating then?

A. Yes, sir.

Q. On what kind of a policy?

A. First-run policy.

Q. And you were operating on what policy?

A. First-run policy.

Q. Calling your attention to the year 1935,—oh, by the way, at that time was the Regent Theatre opened?

A. No.

Q. The Regent Theatre was closed during that period?

A. That is right.

Q. Calling your attention to the year 1935, what policy were the Strand and Rialto being operated on then?

A. First-run policy.

Q. What policy was your theatre being operated on?

[fol. 2313] A. The year 1935?

Q. Yes.

A. I believe I was second-run that year.

Q. You were operating on a second-run policy?

A. Yes, sir.

Q. You had then no major product on first-run?

A. With the exception of a few independents.

Q. My question was with respect to major products?

A. Major product, no major product, first-run.

Q. The major product was being played at the Rialto and Strand?

A. That is right.

Q. During the year 1935 what, if any, efforts did you make to get Warner pictures second-run for your theatre?

A. Well, I contacted the salesmen and the manager.

Q. The manager where?

A. At Albany, and after many interviews I was told that——

Mr. Rogers: May it please the Court, that is objected to. The objection is this is a Branch Manager and salesman he is speaking of.

The Court: First place, he hasn't told who told him.

Q. Do you remember the name of the Branch Manager?

A. I was talking to the representative of the Branch Manager, Mr. Ray Smith.

Q. What was it Mr. Smith told you about second-run products?

[fol. 2314] Mr. Rogers: That is objected to, if it please the Court.

The Court: Overruled.

The Witness: The number of trips I made down there and spoke to him where I asked to buy the second-run

product, he told me he would send the salesman up on different occasions, but that a salesman didn't show up. I finally got to a point where I wanted a direct answer whether I was to purchase the second-run products, and Mr. Smith told me he had an oral commitment for the Schine interests, and if it was a selective contract for any pictures they didn't play, he would be glad to sell me. I said I didn't think I would be interested because I would either——

The Court: Interested in what?

The Witness: In buying the pictures left over after the selective contract was in effect, and I told him that I would want to buy 100 per cent, that is all their product, all their major features.

By Mr. Wright:

Q. On second-run?

A. That is right.

Q. What did he say to that?

[fol. 2315] A. He could not do business.

Q. During that same year did you—what, if any, efforts did you make to get Fox pictures second-run for your theatre?

A. Yes, I tried to buy Fox pictures and had a number of conversations with the branch manager, Mr. Grassgreen.

Q. The branch manager at Albany?

A. That is right, and after many trips to Albany to see him about it he finally told me——

Mr. Rogers: I object to that.

The Court: I will receive it. Did you give the name?

The Witness: Mr. Grassgreen.

The Court: He was an individual or what?

The Witness: Branch Manager in Albany.

The Court: Objection overruled.

The Witness: Finally he told me they could not sell me because he had word from the New York office to that effect.

Mr. Wright: That is all. You may cross-examine.

The Court: Is there any cross-examination? Are you preparing the order, Mr. McKay?

Mr. McKay: Yes, your Honor. I have spoken to Mr. Koehler and expect it down here in a few minutes.

Mr. Wright: Excuse me, there are a few more questions.

[fol. 2316] By Mr. Wright:

Q. On the Regent Theatre, do you remember when the Regent was opened, Mr. Kronick?

A. I don't remember. My recollection is it was some time in the fall of 1936.

Q. Some time in the fall of 1936?

A. I am not sure.

The Court: Was it opened or closed?

The Witness: No, it had been closed. It was opened in the fall of 1936, as I recall it.

By Mr. Wright:

Q. That was, when it was first opened, it had been closed from the fall of 1931 to 1936?

A. Yes, sir.

Q. When the Regent opened, as I understood your testimony, it operated on a second-run policy?

A. Yes, sir.

Q. Prior to the time the Regent opened, your theatre was the only second-run theatre there?

A. That is right, as a general policy.

Q. Then was the Regent operating at the time you closed out in 1941?

A. Yes, sir.

Q. And it operated continuously on second-run from 1936 to 1941?

[fol. 2317] A. With the exception that they run some few first-run pictures known to the trade as sloughs.

Q. That is, first-runs that didn't play the Strand or Rialto, otherwise, second-run?

A. That is all.

Mr. Wright: That is all.

Cross-examination.

By Mr. Rogers:

Q. Mr. Kronick, will you describe the Orpheum Theatre, please?

A. Would I describe it?

Q. Yes.

A. Well, it originally was a store, as I have already stated, rather low ceiling for use as a theatre in modern times, not what we know as a class-A house by any means.

Q. Did it have any men's and women's retiring rooms?

A. Not directly, no.

Q. When you say "not directly," what do you mean?

A. Well, there was a place right adjoining at the rear for the toilet.

Q. In other words, you mean if a man or woman wanted to go to a retiring room there was none in this theatre and they had to go to some adjoining premises in order to use [fol. 2318] those facilities?

A. That is right.

Q. How many seats did the Orpheum have?

A. Originally?

Q. Yes.

A. Originally, when I took over, it had 360, I believe. I remodeled and I put in 299. I think we got in 299 and rearranged the seating so we had 299 seats.

Q. When you remodeled you had less seats than you had originally?

A. Yes. I wanted more space between each aisle, between each row.

Q. How long had that store space been in operation before you took it over?

A. How long had it been operated as a theatre?

Q. As a moving picture theatre?

A. I could not tell you that, because I did not live in the town.

Q. As a matter of fact, after you took the operation over, the first six rows could not be used, could they?

A. They could be used only by two classes of people, the near-sighted and some children who desired to sit up there, but generally speaking for adults they were not suitable.

Q. At that time when you took it over, the Rialto Theatre [fol. 2319] was operating, wasn't it?

A. Yes, sir.

Q. At that time what kind of a house was the Rialto?

A. At that time the Rialto was a "B" house, and the Strand was an "A" house.

Q. At that time what kind of a house was it?

A. It was a theatre.

Q. A large moving picture theatre?

A. Yes, as far as I know. I was never in the theatre.

Q. Were you ever in it?

A. No.

Q. Were you ever in the Strand?

A. No.

Q. Were you ever in the Strand?

A. The first time I was ever in the Strand, I think, was two or three years ago.

Q. It was no different then than when you were operating your theatre before?

A. I could not tell you.

Q. In any event the Rialto and Strand were motion picture houses built for motion picture theatres?

A. That is as I understood.

Q. And both had a seating capacity of over 1,000 seats?

A. Yes, sir.

Q. And modern theatres?

[fol. 2320] A. It is a broad term "modern."

Q. They weren't the old opera house type of theatre?

A. My impression, when I was in there three years ago, it was a nice house. What it was in 1931 or 2, I don't know.

Q. During the time you operated the Orpheum Theatre, you had second-run major product, didn't you?

A. Yes, sir.

Q. And of which of the major companies did you have second-run major product?

A. I had—the year I went to second-run, I had Paramount, Warner, Fox and Columbia, considering them major product.

Q. And you had sufficiently of these second-run pictures to run your house that year?

A. I did.

Q. Now, didn't you, after that, get Metro second-run?

A. That was much later.

Q. When was that?

A. I believe Metro, I first bought Metro in either late 1936 or early 1937.

Q. And you continued?

A. I continued with Metro, second-run Metro.

Q. Until you disposed of the business?

A. That is right.

Q. Just to clarify the situation when you sold this theatre, [fol. 2321] as you say, you had no lease on the property, did you?

A. No.

The Court: No what?

The Witness: No lease.

Q. Therefore you had no lease to sell, did you?
A. That is right.
Q. All you had was equipment?
A. That is right.
Q. And all you sold was equipment, isn't that right?
A. And the clause of good-will.
Q. No good-will can go with equipment, can it?
A. No.
Q. And the price that was paid was for that equipment and was about $7,000?
A. Yes, sir.

Mr. Rogers: That is all.

By the Court:

Q. Did you go to Schine in the first place or did he come to you?
A. I went to Schine.
Q. Well, you had first-run pictures up to 1935 or '36?
A. No, had for a time when I first bought the theatre in 1931 and 2, and then I had one year of Paramount.
Q. And others second-run?
A. Then I ran along with second-run.
[fol. 2322] Q. Except Paramount up to 1935 you had second-run?
A. That is right, outside of—aren't you speaking of majors? The only majors I had was Paramount, with the exception I might have had a few United Artists during those years, a few, not many.

By Mr. Rogers:

Q. I might ask you this, Mr. Kronick, when you went to Mr. Schine, it was your desire at that time to go out of business, wasn't it?
A. If I could make a good deal it was my desire to sell.
Q. And when you sold in 1940 when you had by that time made up your mind to get out of the business?
A. By that time I had made up my mind to get out.

By the Court:

Q. You put in six rows of seats when you first bought the theatre?

A. When I first bought the theatre, the seats were right close to the screen. When I remodeled I took out those seats and shoved them back so I had less seating capacity.

By Mr. Rogers:

Q. When you had Metro you were a second-run customer of other companies at that time, too, weren't you?

A. Yes, sir.

Q. And which were the companies?

A. Paramount, Universal and Columbia.

[fol. 2323] Q. That continued until you sold out in 1941, didn't it?

A. Yes, sir.

Redirect examination.

By Mr. Wright:

Q. On cross-examination, Mr. Kronick, I believe you said that at the time you first went into a second-run policy, you had Warner and Fox pictures second-run?

A. That is right.

Q. That I take it was prior to 1935?

A. That is right.

Q. That business of yours was profitable or unprofitable prior to 1935?

Mr. Rogers: I object to that, may it please the Court, calling for a conclusion.

The Court: Objection overruled.

Mr. Rogers: Exception.

The Court: You may answer.

The Witness: When we ran first-run it was certainly profitable.

Q. I covered the whole period prior to 1935.

A. Taking it altogether?

Q. Taking 1931, 2, 3, and 4.

A. I would say "Yes".

Q. How about the period after the Regent was opened?

[fol. 2324] A. The revenue necessarily became reduced.

Q. Did you lose money?

A. Yes, began to lose money.

Mr. McClennen: That is objected to.

The Witness: Lost money at times.

The Court: What, made money?
The Witness: I lost money at times.
The Court: And made money at times?
The Witness: No, I said I lost money at times.

By Mr. Wright:

Q. With reference to the year 1937, did you make or lose money that year?

Mr. McClennen: Same objection.
The Witness: I don't believe I made much money.
Q. Or lost?
A. Or lost.
Q. How about the years 1940-41, down to the time you sold?
A. Business was falling off. I was then losing money.

Recross-examination.

By Mr. Rogers:

Q. The Orpheum was not a continuous orperation, was it, that is you closed it?
A. No, we had one matinee in the afternoon and then closed it until 7 o'clock.
[fol. 2325] Q. In other words, then at several times you did close the theatre?
A. Several summers I did close for a few weeks or a month, but business in the summertime was very poor in the city, and I would take a vacation for those weeks and close.

The Court: Did the other theatres operate?
The Witness: Yes, they did.

By Mr. Rogers:

Q. Now, that town was a one-industry town, wasn't it, primarily?
A. Primarily.
Q. When the carpet industry was in operation, people went to the theatre and when it wasn't, they didn't go to the theatre?
A. When they had the price.
Q. When the carpet industry was slack, nobody made any money?

A. It is a paradox, Mr. Rogers, when business is bad generally, sometimes a second-run house will do pretty well.

Q. Did you do fairly well when business was bad?

A. Yes, at times.

The Court: That is all?

Mr. Wright: That is all.

[fol. 2326] Mr. McKay: The order will have to — rewritten. He ought to be down here in two or three minutes with it.

Mr. McClennen: If your Honor please, may I refer to Mr. Warner Thompson's testimony with reference to an interview with Mr. McKay? Mr. McKay's diary, as of June 16th, has an entry "Conference with Warner Thompson re Schine". That is the only entry of the day on the subject. Its placement indicates afternoon; that is, in the order of the doings of the day. It might have been in the morning. The diary also shows that on June 18th, 1936, Warner Thompson called by telephone to Mr. McKay.

The Court: Are those the dates to which Mr. Thompson testified?

Mr. McClellen: Those are the dates to which Mr. Thompson testified.

The Court: Have you anything further?

Mr. Wright: We have another witness here, but I am not sure that we could finish in less than half an hour.

The Court: I think we better suspend at this time.

Mr. Wright: Perhaps we had better hold him over until [fols. 2327-2328] tomorrow.

Mr. McClennen: If your Honor please, after the court adjourned on October 6th, 1944, pursuant to the arrangement made in court, we put into the record, to be available, the contents of the Bellefontaine newspaper as far as either party wanted to read it. That we should like to call to your attention early, but it need not be now; that is, as to which should be read to your Honor as part of the examination.

The Court: You can do it any time you wish.

(Whereupon a recess was taken until Tuesday, October 10, 1944, at 10 o'clock a.m.)

[fol. 2329] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA,

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants.

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 10, 1944, 10 o'clock a.m.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 2330] PROCEEDINGS

Mr. Wright: Mr. Warne, will you take the stand, please?

THOMAS EDWARD WARNE a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Warne?
A. Utica, New York.
Q. What is your occupation?
A. I am a payroll clerk for the Savage Arms Corporation.
Q. How long have you held that position?
A. 28 months.
Q. Were you formerly engaged in the theatre business at Little Falls, New York?
A. Yes, sir.

Q. During what period was that?

A. Well, I was engaged in the theatre business fully or in partnership at the Hippodrome Theatre from the fall of 1934 until the spring or early summer of 1936.

Q. Prior to that had you had any theatre experience in Glens Falls or in Little Falls, I mean?

A. Yes, sir.

[fol. 2331] Q. What was that?

A. I worked for the Schine Enterprises at Little Falls for a period of years at the Rialto Theatre.

Q. In what capacity?

A. As manager.

Q. Now, at the time you began to operate the Hippodrome, was there any other theatre operating there besides the Hippodrome and Schines' Rialto?

A. No, sir.

Q. And with whom were you associated in the operation of the Hippodrome?

A. Mrs. Marion D. Wood.

Q. Before you became associated with her who had the theatre been managed by, the Hippodrome, I mean?

A. Mr. Wood, Mr. William—I think his initial was J. William J. Wood.

Q. Then you came in after he died?

A. That is right.

Q. When you began to manage the Hippodrome Theatre what policy was it operating on?

A. It was operating on a second-run policy with Mr. Wood previous to his death, and it started operating the same way after I took it over.

Q. Playing what product?

A. Well, I can't explain what product Mr. Wood had.

[fol. 2332] Q. I mean at the time you took it over, what were you playing?

A. That is right, I was running it on—I had second-run product,—Paramount, Columbia and Universal. I also had second-run product with First Division, Standard and Pyramid, which was another very small independent.

Q. Those last three names you mentioned are all independent companies?

A. They are all independent companies, Standard, Pyramid, and First Division. Incidentally I also that first year had some United Artists pictures which I ran first-run.

Q. You had some first-run United Artists?

A. Yes, as I recall I contracted for not less than 18 and I may have played 18 or may have played 20 or 21.

Q. What policy was the Rialto Theatre operating on then?

A. During that same period the Rialto Theatre was operating first-run major products.

Q. All major products except United Artists?

A. I would say so, yes, sir.

Q. What, with respect to admission price policies at the Rialto and Hippodrome?

A. My prices were 10 and 20 cents, 10 cents for children and 20 cents for adults any time, any place in the house.

Q. Matinee and evening?

[fol. 2333] A. Matinee and evening.

Q. When you say "any place in the house," did your house have some balcony seats?

A. Yes, sir, such as they were. There was a very small balcony seating between 80 and 100 people. It wasn't a very good balcony. If they chose to sit there when the house was crowded, O. K., it was still 20 cents.

Q. What was the total seating capacity of the house?

A. 550.

Q. What were the prices at the Rialto?

A. 10, 20 and 30 cents, as I recall it, at that time.

Q. Those were what, respectively?

A. I would say 10 cents for children, 20 cents balcony and 30 cents orchestra.

Q. How much of a balcony did the Rialto have?

A. A very fine, modern balcony.

Q. Approximately how many seats?

A. The balcony had about 500 seats.

Q. What was the total capacity of that theatre?

A. The Rialto Theatre, about 1200, I would say.

Q. Now——

The Court: This theatre you spoke about it being a modern balcony, was it new or built over?

The Witness: No, the Rialto wasn't built over, the Rialto Theatre was a modern theatre.

[fol. 2334] The Court: Modern building?

The Witness: Yes.

The Court: I didn't know whether the balcony applied to the whole theatre or not.

The Witness: Yes.

By Mr. Wright:

Q. The second-run product that you used, can you state about how long after the first-run that was played at the Hippodrome?

A. Yes, I would say quite definitely——

The Court: How long after what?

Mr. Wright: After the pictures were played first-run.

Q. How long?

A. The difference or the running time between first-run Rialto and second-run which I had at the Hippodrome Theatre, my contract called for 90 to 120 days clearance.

Q. Now, did you make any efforts to get any other major products second-run for the Hippodrome after you took over the management?

A. Yes, sir.

Q. What did you do?

A. Well, I went to Albany and saw the Exchange Manager of——

Mr. McClennen: Just a moment, I submit that ought not to be so general.

The Court: In what period do you mean?

[fol. 2335] Q. When was it that you took over the management?

A. I took over the management of the Hippodrome Theatre in September, 1934.

Q. September, 1934, then when was it with reference to that date you made this trip to Albany to see the Exchange Manager?

A. Well, it was about the first of September, or the first part of September, 1934, before we opened, or the middle of September.

[fol. 2336] Q. Whom did you see in Albany?

A. I saw Mr. Halligan at the RKO Exchange; I also saw Ray Smith at Warner Bros. I saw Moe Grassgreen at the 20th-Century-Fox and I saw Ralph Pielow at Metro-Goldwyn-Mayer.

Q. Can you tell us, first, what the conversation was that you had with Mr. Halligan?

A. I can give you——

Mr. McClennen: The usual objection, sir.

The Court: Overruled.

Q. You may answer.

A. I can give you a general idea of what the conversation was.

Q. The substance of it.

A. The substance of it was, I went in there merely for one purpose, to buy pictures, and I asked Mr. Halligan if I could buy RKO pictures. I told him I wanted to buy RKO pictures for the Hippodrome Theatre in Little Falls.

The Court: You mean first-run?

The Witness: No, sir, second-run. It was understood I could not buy them first-run, so I did not stipulate to Mr. Halligan to get first-run.

The Court: You did not have second-run?

The Witness: Yes, sir. Mr. Wood had them previous to [fol. 2337] my operation of the theatre.

Mr. McClennen: I ask that that be stricken out, not responsive to the question.

Mr. Rogers: That part of the answer in which the witness said it was understood he could not have first-run.

The Court: Strike it out. He was speaking about the run, and I did not know whether he attempted to get first-run.

By Mr. Wright:

Q. What, if anything, did Mr. Halligan say with reference to your getting or not getting second-run?

A. Mr. Halligan told me he had not closed the first-run deal with Schine's theatre in Little Falls, and was not ready to sell second-run for the Hippodrome Theatre at that time.

Q. Do you recall what was said in your conversation—was that all the conversation you had with Mr. Halligan?

A. Except that I asked Mr. Halligan to notify me when his first-run deal was closed with the Schine Enterprises, so that I might be able to do business with him on second-run RKO product, and he told me he would notify me later on. I just left the exchange then and thanked him and went along to the next one.

Q. What was the next one?

[fol. 2338] A. I would say it was Metro-Goldwyn-Mayer. I don't recall just in what order I called on these different exchanges.

Q. You called on them all about the same time?

A. All about the same time. Our conversation was practically the same in each case.

Mr. McClennen: May that be stricken out?
The Court: Yes.
Mr. McClennen: The Metro man was Ralph——
The Witness: Ralph Pielow.

By Mr. Wright:

Q. Can you give us the substance of the conversation you had with Mr. Pielow?

A. The substance was, I was running the Hippodrome Theatre in Little Falls. We were ready to open and that I wanted to buy product for the theatre, Metro-Goldwyn-Mayer product, and asked him to make a deal with me. Mr. Pielow told me that he had not closed with Schine, and at the present time he could not make a deal for second-run product, so I asked him to do the same as I had asked Mr. Halligan to notify me when he was ready to sell. That was about all the conversation I had with Mr. Pielow.

Q. What was the conversation you had with Mr. Grassgreen?

A. Mr. Grassgreen at Fox—do you want me to repeat that, sir?

[fol. 2339] Q. Whatever the substance was.

A. The substance was, I wanted to buy 20th Century-Fox pictures for the Hippodrome Theatre. I understood from Mr. Grassgreen he was not just ready to sell second-run yet, and that later on in the season he might be able to sell me some second-run pictures. So I told him I would come back and call on him later on, which I did.

Q. Who was it you saw at Warner?

A. Ray Smith.

Mr. McClennen: I have not mentioned the objection each time, your Honor. I take it it applies.

The Court: I understand your position about it. Objection overruled.

By Mr. Wright:

Q. What was the conversation you had with Mr. Smith, as nearly as you can recall?

A. As nearly as I recall, the conversation was similar, that I wanted to buy second-run pictures for the Hippodrome Theatre in Little Falls, which we were expecting to open immediately, or as soon as we could make definite arrangements for product, and that I was in the market for second-run Warner pictures.

The Court: In September, when you took the theatre over, did you have contract with these various companies?

[fol. 2340] The Witness: Yes, sir.

The Court: Which would have continued until when?

The Witness: Until the next buying season, which would be the following summer.

By Mr. Wright:

Q. I don't think you understood the Court's question. As I understood it, you formerly testified the product you were using there at the time was Paramount, Universal and Columbia?

A. That is right, sir. That was the only product.

Q. He asked you with reference to these particular RKO, Metro-Goldwyn-Mayer, Fox and Warner. Is that right?

The Court: I thought his prior answer referred to more of them. What were you running in September with the major companies?

The Witness: Up to this time——

The Court: In September when you went in there.

The Witness: My predecessor was running pictures that I believe were purchased—I am not sure just what product he was running, because I was not in a position to watch the operation of his house.

The Court: When you took over what did you continue with?

The Witness: Columbia, Universal and Paramount, and [fol. 2341] three independent companies.

The Court: All right.

By Mr. Wright:

Q. Did you hear anything further from any of those gentlemen you talked to at the exchanges?

A. No, sir.

Q. Did you go in to see them again about making a second-run deal?

A. I made repeated trips to Albany, but I cannot say definitely just who I saw on those repeated trips, because of the fact at times I would go into an exchange and the man I wanted to see was not there.

Q. These repeated trips you are referring to were made during what period?

A. Made during the period of, I would say, between October of 1934, which was after the time we opened the theatre, and the following spring, or—I will correct that, if you don't mind. I will say the fall of the next year. That was from October, 1934, until, I will say, October, 1935.

Q. Do you recall what, if any, reason was given to you by the exchanges as to why they would not or did not sell you a second-run?

Mr. McClennen: That is objected to. The witness's testimony is he could not recall that he saw them; that he went [fol. 2342] and that the men sought were not in.

The Court: He said he did not recall who he saw.

Mr. McClennen: I object to this question.

The Court: Sustained.

By Mr. Wright:

Q. In the course of these repeated trips you made during that year did you at any time see any of these exchange managers again?

A. I can say that I saw some of them, but the ones that I saw I cannot recall, because I would go into all of the exchanges, and one exchange I might see——

Mr. McClennen: May that last be stricken out, "because," and so forth?

The Court: No, I will let it stand. He said he went to the various exchanges and called on different individuals. Is that your answer?

The Witness: Yes, sir.

Q. Do you recall whether any of them ever took an application from you for second-run product?

Mr. McClennen: That is objected to.

The Court: I will let him state whether he recalls that he presented an application to any one.

The Witness: I do recall I called at the respective exchanges. I also recall none of them ever made a contract [fol. 2343] with me, none of the four major exchanges that I have mentioned.

Q. Did they ever offer the product to you in the form of an application?

Mr. McClennen: That is objected to. "They" means group. It should be man-by-man.

The Court: It should be confined to the salesmen or managers, Mr. Wright. Did the salesmen or the managers of these companies ever offer him any application?

The Witness: I beg your pardon, I did not quite hear.

The Court: Did any of the salesmen or the managers of these companies which you have mentioned ever present an application to you for the purchase of second-run?

The Witness: No exchange manager or salesman of RKO or Metro-Goldwyn-Mayer or 20th Century-Fox or of Warner Bros., ever offered me an application for pictures, either first or second run.

Q. Now then, in the fall of 1935 did you again make any efforts to secure second-run from these exchanges that you have just mentioned, for the 1935-1936 season?

A. I would say that after October, which I have already [fol. 2344] mentioned——

Q. After October, 1935?

A. Of 1935, I do not recall that I ever made trips to exchanges after that asking for product.

Q. During the 1934-1935 season what was the policy of your theatre and the Rialto Theatre with respect to showing double features?

Mr. McClennen: That is objected to, including two in the one question.

The Court: Yes.

Mr. Wright: I thought we might save a little time.

The Court: I will let him state the policies of each.

By Mr. Wright:

Q. State, first, what the policy of the Rialto was.

The Court: 1934-1935.

The Witness: During the 1934-1935 season?

By Mr. Wright:

Q. Yes.

A. Double-feature policy.

The Court: Both yourself and the Rialto, you mean?

Mr. Wright: He was just asked about the Rialto separately.

The Court: All right.

The Witness: The Rialto Theatre was a double-feature policy.

Q. What policy were you playing at the Hippodrome?

A. At that time I was playing double-feature policy, with [fol. 2345] the second-run product, but when I played one of the United Artists' pictures, which I was playing, we will say, one every three weeks, I single-featured that picture and played short subjects with it.

[fol. 2346] Q. Those were the pictures you had bought of first-run?

A. That is right, the 18 to 20 United Artists pictures.

Q. Then did those double feature policies you have just described — into the 1935-36 season?

A. Well, those double feature policies, you are referring to my house now, the Hippodrome, sir?

Q. Let us take your house first. Did you continue to double feature into the 1935-36 season?

A. I continued to double feature as long as I had a sufficient number of pictures to double feature.

Mr. McClennen: That is objected to.

The Court: Strike it out. State the time.

Q. When was it?

The Court: How long did you continue that?

The Witness: Towards, up until—this is more or less now of a guess now on this question because I have no data; I destroyed all of my records. I am going to answer this to the best of my ability. I continued to double feature, I would say, up to about December, 1935 or January, 1936, and I can continue that if you wish.

Q. Then what happened?

Mr. McClennen: That is objected to.

The Court: Well, I will let him say what was done, what [fol. 2347] happened. What was done in December, 1935, or January, 1936?

The Witness: Well, I had to go into a single feature policy and play the short subjects.

The Court: You went into a single feature policy?

The Witness: That is right, sir.

By Mr. Wright:

Q. And after you went into that single feature policy, do you recall what the policy was during that period at the Rialto?

A. Yes, sir.

Q. What was it?

A. Double feature.

Q. Then those policies continued for how long?

A. Well, my single feature policy was intermittent in this way. There were times when I could only get one feafeature; there were other times when I could get two, so it continued like that until the spring or June of 1936.

Q. And then what did you do?

A. Then I closed the theatre for the summer.

The Court: Closed for the summer?

The Witness: I closed the theatre for the summer. I put signs in front that I was closing the theatre for the summer season.

Q. What were the facts which caused you to close the theatre?

[fol. 2348] Mr. McClennen: That is objected to.

The Court: Well, state the facts, not your conclusions. Did you close before in summer?

The Witness: No, sir, I closed in about the middle of June or along toward the 20th of June, I believe in 1936. It was getting warm.

The Court: What was done at that time? Don't state your conclusions about it. State the facts.

The Witness: You mean, your Honor, the reason why I closed the theatre in June?

The Court: If your reasons are statements of facts, yes.

The Witness: The reasons are statements of facts, sir.

The Court: What happened?

The Witness: In June I closed the theatre for two reasons, primarily. One was that I was not getting sufficient salable product to make money, and the second reason was that we were running short of funds as well as product to continue.

By Mr. Wright:

Q. Now, was there any period during the time you operated the Hippodrome there when you reduced the admission prices you have described, or resorted to any practices which would amount to a reduction?

[fol. 2349] A. Yes, sir, there was.

Q. What was that?

A. Well, I can't recall exactly what it was, but I can tell you what it was.

Q. Well, do you know the approximate year that it occurred in?

A. I would say that it occurred in the spring of 1935. That again is a guess.

Q. Is that your best recollection?

A. That is the best recollection.

Q. What was it that you did then?

A. Well, I had a ticket printed which I termed a "Family Ticket." Those tickets were given to our patrons as they would come into the theatre and purchase an adult ticket over the first part of the week, say, what we termed Saturday, Sunday or Monday. Those tickets could be used on the following two days, Tuesday and Wednesday, or Wednesday and Thursday, for what we termed a two-in-one admission. In other words, that ticket and the purchase of one adult ticket entitled two people to enter the theatre.

Q. How long did you continue that policy?

A. I would say a couple or a few weeks.

Q. Then did you have any conversation with any of the exchange managers about that policy?

[fol. 2350] A. Well, yes, about the second or third week that I had that policy in existence, as I recall, I had either a telephone conversation or correspondence with some of the exchange managers.

Q. Do you remember who they were?

A. No, actually I don't recall.

Q. Well, do you remember having any discussion with any of them at any time with reference to those two-for-one admissions?

A. Yes, I was called in to Albany. May I continue to answer?

Q. Yes.

Mr. McClennen: Just a moment, that is all the question so far.

The Court: Called to Albany?

Mr. McClennen: He was asked if he had any conversation. He said "Yes, I was called in to Albany," and he was about to state the conversation. I suggested he hadn't been asked that yet.

By Mr. Wright:

Q. By whom were you called in to Albany?

A. I got the letter signed by the Film Board of Trade. I don't know whose signature was on it.

Q. Who did you see in Albany?
A. The only one I recall was Mr. Halligan.
Q. That was the R.K.O. Branch Manager?
[fol. 2351] A. Yes, sir.
Q. Where was it you saw Mr. Halligan?
A. In the offices of the Film Board of Trade.
Q. What was the conversation with Mr. Halligan?

Mr. McClennen: Same objection.
The Court: Overruled.
The Witness: The conversation with Mr. Halligan was to the effect that I had to discontinue the "Two-for-one" policy and live up to the letter of my contract, charging the 20 cents top price.

Q. Was that all the conversation then?
A. I objected to that, of course, and told him it was helping my business and drawing a few extra dollars in that I would not have received otherwise. He said regardless of that I had to discontinue the policy in order to fulfill the contract; in other words, the exchanges would be obliged to discontinue the film service.
Q. Did you have any contracts with R.K.O. at that time?
A. No, sir.
Q. Then did you discontinue the policy?
A. I certainly did.
Q. After you closed the theatre in—what was that—May or June of 1936, did you say?
A. Well, I don't recall, I don't know what you are refer-
[fol. 2352] ring to.
Q. After you closed the Hippodrome for the summer?
A. That was in June of 1936.
Q. Did you receive a call from anybody connected with the Schine organization?
A. I received a call from Judge Blumberg in Little Falls, whom I understand is——

Mr. McClennen: May that be stricken out, the understanding of the witness?
The Court: Yes, strike it out.

Q. Well, just tell what happened after you got this call from Blumberg.

Mr. McClennen: That is objected to.
The Court: Well, he is not asking for the conversation.

Q. I did not ask him for the conversation here; I asked him what he did after he got the call from Blumberg.

The Court: What did you do?

The Witness: I went over to Mr. Blumberg's office as he requested.

Q. Whom did you see there?

A. I saw Mr. Selmsner. That is right, Selmsner, I think is the way it is spelled.

Q. What was the conversation that occurred there?

Mr. McClennen: That is objected to.

Mr. Wright: Is there any question about Mr. Selmsner? [fol. 2353] At this point I would like to read into the evidence the answer to interrogatory No. 3, which states that J. G. Selmsner, Gloversville, New York, was Assistant Treasurer and Director of Schine Theatres, Inc., for August 31, 1931 to date, and Assistant Secretary of that company from February 14th, 1933 to date.

The Court: Objection overruled. What did Selmsner say?

The Witness: Mr. Selmsner asked me why I closed the theatre. I explained to Mr. Selmsner I closed it because of the fact that we were going to do a little remodeling during the summer months. He said he was in a position to make me an offer if I wasn't going to be too tough to do business with. I told Mr. Selmsner I would have to take the matter up with Mrs. Marion Wood, before I could get him a definite answer to that. Mr. Selmsner told me to take the matter up and he would see me in a few days or some time later.

Q. Is that all the conversation you had then at that particular time?

A. Yes, sir.

[fol. 2354] Q. Then did you take the matter up with Mrs. Wood?

A. I did.

Q. Then did you see Selmsner again?

A. Yes, sir.

Q. Whereabouts?

A. Same place, Judge Blumberg's office.

Q. What was said there?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: May I continue?

The Court: Go ahead.

The Witness: That second meeting, after I had seen Mrs. Wood, I told Mr. Selmsner that we had decided that we wouldn't be tough to do business with, and invited an offer from him. He asked me some of the details pertaining to the theatre, how it stood financially, and so forth, and I gave him the facts in the case, at that time, because in the meantime I had made an inventory of the equipment and a few outstanding debts and I closed the deal there and then with Mr. Selmsner.

The Court: What?

The Witness: I closed a deal for him to take over the theatre.

[fol. 2355] Q. That consisted of what?

A. That consisted of the equipment in the theatre.

The Court: You did not own the building?

The Witness: We did not own the building, no, sir.

Q. And how much did you and Mrs. Wood receive?

A. Well, in actual cash, as I recall, we received about $400.

Q. For both of you, that is?

A. Between the two of us.

Q. The rest was in payment of what?

A. The rest was in payment of some outstanding debts we had rent, for some newspaper advertisements, I believe, and a few bills to a few local merchants for maybe electrical work we had done by Coffy & Turner, I am quite sure was one bill.

Q. Do you know about what the total amount of that was?

A. The total amount was about, I would say $1300.

The Court: In addition to the $400?

The Witness: In addition to the cash, yes, sir.

Q. $1300 was the amount of the assumed obligations?

A. That is approximate.

Q. Then did you remain in Little Falls?

A. Yes, sir, I remained living in Little Falls.

Q. Did you notice what was done, if anything, with the Hippodrome Theatre?

[fol. 2356] A. Well, I noticed it was closed a great deal of the time, if that is what you mean.

Q. How much of the time, what was the period you lived there?

A. I continued to live there from the time I made my deal with Mr. Selmsner until the fall of 1937.

Q. And during that period do you know how much of that time the Hippodrome was open?

A. Well, I don't know exactly how much time the Hippodrome was open, it wasn't open continually as we had kept it open when I was operating it.

The Court: You said you closed for the summer because you were running short of funds and product?

The Witness: That is right.

Q. Since 1937, have you been in Little Falls frequently?

A. Occasionally.

Q. How often?

A. Three times a year.

Q. Well, have you noticed whether the Hippodrome was opened or closed on those occasions?

A. Usually closed.

The Court: The opportunity of his observation should be stated. There may be some way of fixing the time. He has been there several years, three times a year.

Q. Now, during the time that you were operating the [fol. 2357] Hippodrome, did you notice whether the Rialto played any R.K.O., Metro, Fox or Warner product second-run?

A. During the time I was operating the Hippodrome?

Q. Yes.

A. They did not play any of those products second-run.

Mr. Wright: That is all.

Cross-examination.

By Mr. McClennen:

Q. When did you sever your connection with the Schine organization?

The Court: When did you what?

Q. When did he sever his connection with the Schine organization?

A. Well, I would say it was in the fall of 1933, I believe.

Q. Were you in the moving picture business between that time and the time when you went to work for Mrs. Wood?

A. No, sir.

Q. You had no occasion to observe anything about the moving picture business in that period?

A. Only my interest in the theatre business for years.

Q. You spoke of your visits to the exchange managers in Albany; you mentioned all the companies whose managers you visited?

A. Yes, sir.

[fol. 2358] Q. You did not visit Paramount's manager?

A. I did.

Q. When did you visit Paramount's manager?

A. During the time I was in Albany in September of 1934.

Q. And you procured from him of the second-run product of 1934-35, 64 pictures?

A. No, sir, not from him.

Q. You secured in some way 64 of the Paramount second-run product of 1934-35?

A. Yes, sir.

Q. Did you secure them in Albany?

A. No, sir.

Q. Did you secure them on solicitation?

A. Yes, sir.

Q. Made to you?

A. I would say so.

Q. Do you recall that?

A. Yes, sir.

Q. And you had the entire Paramount-second-run product of the 1935-36 season, also?

A. To the best of my knowledge, yes, sir.

Q. And on solicitation by Paramount?

A. Mr. Dick Hayes was salesman for Paramount.

Q. You operated from the time that you were engaged in this operation in the beginning of September, 1934 with [fol. 2359] Paramount, Columbia, Universal and what other second-run product?

A. With those three second-run products and what pictures I could buy from the independents. The First Division, of course, was independent, and I run it first-run, I believe, or most of it, unless my opposition bought maybe a selective contract, which I don't know. The same would apply to Standard and Pyramid.

Mr. McClennen: May that be stricken out?

The Court: It wasn't responsive. Strike it out. Read the question.

(Question read.)

The Court: During the period from 1934.

The Witness: I would say no other second-run products.

[fol. 2360] Q. No other second-run products?

A. Yes, sir.

Q. Did you have First Division?

A. Yes, sir.

Q. Standard?

A. Yes, sir.

Q. And Pyramid?

A. That is right, sir.

The Court: What is the name of the first one, First Division?

Mr. McClennen: First Division is the name of an independent distributor.

The Court: What are the others?

Mr. McClennen: Standard and Pyramid.

By Mr. McClennen:

Q. When you entered on this operation of the Hippodrome was it then in active operation?

A. No, sir.

Q. Was it a closed theatre when you entered on the operation?

A. Yes, sir.

Q. For how long had it been closed?

A. It had been closed about six weeks.

Q. When did you make your arrangement to enter Mrs. Wood's employ in the operation?

A. I started to make the arrangements to go into business with Mrs. Wood during the time Mr. Wood's mother [fol. 2361] was in Little Falls attending the funeral. That was—I can't recall the exact date Mr. Wood died, but his mother was there and I met her and talked with her.

Q. How long before September 1, 1934, do you recall, that Mr. Wood had died?

A. About six weeks. That is why I said, sir, that the theatre had been closed about six weeks.

Q. Did you play any product of any distributor off the old contracts, if any, that had been made?

A. Yes, sir, I did.

Q. What distributors' product did you play off the old contracts?

A. Two, I remember distinctly, Paramount and Columbia.

Q. You made the United Artists' contracts as fresh contracts after you took up the operation?

A. Yes, sir.

Q. Do you remember whether you played any RKO pictures at all?

A. No features. I did play some short subjects.

Q. You did play short subjects?

A. That is right, sir.

Q. During what period did you play RKO short subjects?

A. I believe it was in the 1935-1936 season.

Q. When do you say that you had your talk with Mr. Halligan of RKO about your cut-rate admissions?

[fol. 2362] A. That was when I was called into the Film Board of Trade.

Q. When?

A. The date, you mean?

Q. Yes, approximately.

A. I would say that was approximately—well, the fall of 1934—the winter, rather, I would say. We opened up in September. Some months after that. Just how many months after that I cannot recall, but I will say approximately in December or January of next year.

Q. In December of 1934 or January of 1935?

A. The winter or January of 1935, yes, sir. I think that is along about when it was.

Q. That was during the period of the operation under the N.R.A., was it not?

A. I believe you are correct, sir.

Q. You knew that the President had approved the Motion Picture Code under the N.R.A. in November, 1933?

A. I should have known it.

Q. Don't you remember that you did know it?

A. I cannot say that I do remember now.

Q. I don't mean the date, but you remember that at that time the industry was operating under a Code which the President of the United States had approved?

A. Yes, sir.

Q. And you remember that one of the provisions of that [fol. 2363] Code was against the cutting of rates of admission?

A. Yes, sir.

Q. And when you cut your rates you knew that you were violating the Code which the President had approved?

A. No, sir, I didn't consider I was cutting my rates.

Q. That is, you did not consider that when you sold two tickets for the price of one admission that you were cutting your rates?

A. I did not exactly sell tickets two-for-one, sir. We gave one ticket, a good-will ticket. The other ticket I sold for 20 cents, which was the full price.

Q. I see. That is, one of the persons got in for the regular admission price?

A. That is right.

Q. And the other one got in for nothing?

A. Well, that is it.

Q. You did not think that admitting patrons to your theatre for nothing was cutting your rates?

A. I really didn't consider it. That is, I didn't consider it in just that light.

Q. It was brought to your consideration, was it not?

A. By the Film Board of Trade in Albany, yes, sir.

Q. When it was brought to your consideration you then realized that you were violating the Code which the President had approved?

[fol. 2364] A. That is quite right, sir.

Q. You don't know after that of any effort of the distributors to sell you product, do you?

A. No, sir.

Q. Now, you say that when you had your conversation which developed into the purchase of your equipment, you said that you had closed for the purpose of making alterations in your theatre?

A. Yes, sir.

Q. Was that the truth?

A. We had talked, Mrs. Wood and I, about——

Q. That is very simple. Was that the truth?

A. Yes, it was the truth at that time.

Q. That is, you had closed at that time for the purpose of making alterations?

A. That was one of the reasons we closed, and that was our intention, to make alterations.

Q. At the time that you closed, with this intention to make alterations, you were behind on the payment of your current bills?

A. Yes, sir.

Q. You had no cash?

A. Yes, I did have cash.

Q. Well, not adequate cash to run your theatre, your operating expenses, did you?

[fol. 2365] A. I can answer the question if I may answer it in my own way, sir.

Q. If your own way is to tell me whether you had adequate cash to run the theatre, then do so.

A. I had a thousand dollars, or approximately a thousand dollars, of my own that I had received from the United States Government, Soldiers' bonus, in 1936.

Q. Had you put it into the theatre?

A. Not yet.

Q. Had you devoted any of it to the payment of your current bills of the theatre?

A. No, sir.

Q. And the reason why you did not pay your current bills was not that you wanted to avoid the payment of your debts but that the theatre did not have the money to pay them?

A. The theatre did not have the money to pay them, that is right, sir.

Q. And the conditions had got so bad that you had actually given a check to one of the distributors when you had no funds in the bank to meet it?

A. Did I hear you correctly, that I gave a check to the distributor when I had no funds to meet it?

Q. Yes.

A. I don't recall that, sir.

[fol. 2366] Q. What?

A. I do not recall that.

Q. Don't you remember a check coming back for lack of funds, from one of the distributors?

A. No, sir, I do not.

Q. This is something that has not been called to your attention for a great many years?

A. That is quite true.

Q. Won't you reflect on it a little and see if you can't recall that you had given a check when you had insufficient funds to meet it?

A. I don't recall any check coming back marked "Insufficient funds."

Q. You don't recall any check coming back marked "Insufficient funds"?

A. No, sir.

Q. Well, the check would come back to the distributor, would it not, if you had issued one for insufficient funds?

A. I mean by that I don't recall any distributor speaking to me about such a matter.

Q. Do you remember a check for $43 being drawn when there were insufficient funds in the bank to meet it?

A. No, sir, I don't recall it.

Q. You have no positive recollection that you did not do [fol. 2367] such a thing, do you?

A. I have the positive recollection that I would not do such a thing knowingly.

Q. Well, do you remember that in May of 1936 the bank account of the theatre did not have as much as $43 in it?

A. Well, I would believe that.

Q. Now, was the product situation with which you were dealing such that you thought it was a prudent thing to advise Mrs. Wood to go to the extent of remodeling the theatre?

A. No, sir, it was not.

Q. And the product situation, then, was not such that you thought yourself that it was a prudent thing to remodel the theatre, is that true?

A. That is true.

Q. When was it that you had considered the matter of remodeling the theatre first?

A. When things got so bad in the spring, we will say——

Mr. McClennen: May that be stricken out? The time is what I asked.

The Witness: I beg your pardon. I will say in May or June.

Q. May or June of 1936?

A. 1936. I would prefer to say May, some time before closing.

Q. Was it at about the time when you had, perhaps, less than $43 in the theatre's bank account?

[fol. 2368] A. I could not say as to that. I think there were a number of times when we had less than $43 in the theatre's bank account.

Q. Running all the way along through the operation?

A. Not necessarily the first year. The first year I thought we were doing quite well, and so did Mrs. Wood. The second year we operated, the second season——

Mr. McClennen: I ask that it be stricken out.

The Court: That is not responsive. Answer the questions he asks.

Q. The price of the admission with which you gave a ticket for a free admission was ten cents?

A. Twenty cents, sir.

Q. Is this one of your tickets that I show you (handing to witness)?

A. Yes.

Q. The price of admission, with which you gave a free admission, was ten cents, was it?

A. With which we gave a free admission? This was our free admission ticket, our family admission ticket. When they purchased a 20-cent ticket we gave them one of these.

The Court: Louder.

The Witness: When they purchased a 20-cent ticket on Sunday or Monday, we would give them one of these family [fol. 2369] theatre tickets; this ticket and ten cents would admit someone to the theatre.

The Court: Adults, you mean, ten-cent tickets?

The Witness: On this ticket and a ten-cent ticket, yes.

Q. That was the transaction which you did not realize was cutting your admission rates, is that it?

A. Well, no, I did not really realize it. I did not consider it that way.

Q. During the period when you were operating the Hippodrome the Rialto operated on a single-feature policy on Sundays, Mondays and Tuesdays of each week, did it not?

A. I did not know it, if they did.

Q. You knew nothing to the contrary of that, did you?

A. No.

Q. After you left Little Falls in 1937, how often were you back there during the next three or four years?

A. I would say about a dozen times, maybe a little more.

Q. In the whole period?

A. That is right, sir.

Q. On each of those occasions did you go down to the Hippodrome Theatre?

A. No, sir.

Q. Did you go down to the immediate vicinity of the Hippodrome Theatre?

A. How far would that be, the immediate vicinity? The [fol. 2370] town is so small that I would say when you are in town you are in the vicinity.

Q. Within eye-sight of it?

A. Oh, no, sir.

Q. In that period of three or four years how many times do you remember seeing the Hippodrome closed?

A. I remember seeing it closed, definitely seeing it closed, once, when I was at the City Hall, which is just across the street.

Q. That is the only time in those four or five years that you recall seeing it closed?

A. Yes, sir.

The Court: Was that in the evening, do you mean?

The Witness: Yes, sir.

Q. At the time of your negotiations that you have described, which resulted in the sale of the equipment in the theatre, did you have any lease of the theatre?

A. No, sir.

Q. Did you at any time during your operation have any lease of the theatre?

A. No, sir.

Q. Who owned the theatre?

A. The theatre building is owned by the Odd Fellows Temple Association.

Q. At the time of considering the renovation or improve- [fol. 2371] ment of the theatre did you intend to improve the theatre under the occupancy that you were then enjoying?

A. Yes, sir.

Q. How pressing were these unpaid bills that were paid off by the Schine organization when they bought the equipment?

A. How pressing were they?

Q. Were they all then immediately due?

A. Well, I would say that the rent had been over-due. That also would apply to the two others that I mentioned,

that was the newspaper, the Evening Times, which was a rather small one, and, as I recall, a Coffey & McTurner, the el-ctrical bill.

Q. How long had the rent been over-due?

A. Why, maybe three months, maybe we owed back three months.

Q. How long past due were your advertising bills?

A. Well, we always paid each week some small amount on them, but they had been carrying us along for some little time, as I recall. I can't say just how long.

Q. How long had the electrical bills been over-due?

A. That was, I will say, a few months.

Q. Had you been warned that the electric service would be turned off?

A. I don't recall. I may have been but I don't recall. I don't recall that I owed the electric service any money. I may have owed the electric service some money, but I did [fol. 2372] not include that. When I say "Coffey & McTurner," I mean electrical equipment bill. I am not referring to the electric service in town.

Q. That is, this equipment which you sold to the Schine organization was one that you had acquired on some deferred payment plan?

A. Mrs. Wood's husband, William Wood, had bought this equipment when he started in operation, and it was still in the theatre when Mrs. Wood and I started to operate the theatre after his death.

Q. Had it been bought on some deferred payment plan?

A. I don't know, sir.

Q. What did you owe for electrical equipment?

A. We had an accident, a small fire, in the projection booth some time previous to the spring of 1936, and that equipment in the booth had been taken care of and gone over and repaired by Coffey & McTurner, an electrical store —company—there in the city of Little Falls.

Q. You owed for that?

A. That repair work.

Q. That repair work?

A. Yes, sir.

Q. Had there been any attempt on their part to put any lien on?

[fol. 2373] A. No, sir.

Q. And that repair work, you say, was done when?

A. It was done, I said, some time previous to the spring of 1936, because that is when Mrs. Wood and I made our deal with Schine, so the fire, of course, was previous to that.

[fol. 2374] Q. That is some time previous to the spring of 1936?

A. Yes, sir.

Q. For how long previous?

A. Well, that fire occurred during the season.

Q. That is the 1935-36 season?

A. 1935-36 season, that is right.

Q. Before or after, we will say, Christmas time?

A. Yes, sir.

Q. Which?

A. I would say maybe after Christmas time.

Q. Much after?

A. I could not say, sir; I really don't recall just when the fire was.

Q. Well, would it be within your recollection that you were about six months overdue on the payment of that bill?

A. I doubt it that it was that long.

Q. May have?

A. It may have, yes, sir.

Mr. McClennen: That is all.

Redirect examination.

By Mr. Wright:

Q. Mr. Warne, on cross-examination you were asked the question whether you knew of any efforts of distributors [fol. 2375] to sell products to you after this hearing with reference to admission price violations occurring, and I believe you answered that you did not, is that right?

A. That is right.

Q. Which distributors were you referring to?

A. I was referring to the same four distributors that made no efforts previous to that, R.K.O., Fox, Warner and Metro.

Q. Those distributors whose product you were using at the time of the alleged fire were what?

A. Paramount, Columbia, Universal, and the three independents.

Q. And those, Paramount, Universal and Columbia, did or did not continue to solicit your business?

A. They continued to solicit my business.

Q. And they got it, did they not?

A. They continued to service me with pictures that were under contract, and I continued playing them.

Q. Did any of these representatives of Fox, R.K.O., Warners or Loew's ever give you, as a reason for not serving you, the fact that you had cut admission prices?

Mr. McClennen: That is objected to, it appeared that——

The Court: Sustained.

Q. What, if any, reason, or were any reasons ever given to you by the representatives of those companies as to why [fol. 2376] they would not serve you other than what you have already stated?

A. No, sir, no other reasons other than what I have already mentioned.

Q. That is, by reasons, you have already stated, I am referring to your statement on direct-examination that they were negotiating deals with Schine?

A. That is right.

Mr. McClennen: That is objected to.

The Court: What difference does it make? Strike it out.

Mr. Wright: I wanted to make it perfectly clear, if the Court please.

The Court: He has already answered that before on direct-examination.

Mr. Wright: As I understood counsel's cross-examination, he attempted to imply that the reason Mr. Warner wasn't sold was because of this price cutting incident.

The Court: He testified before he had no talk with the representatives prior to the time he went to Albany. If he didn't have any talk with him, they could not give him any reason.

Mr. Wright: As I understood his testimony he said he [fol. 2377] made repeated visits to the exchanges from the fall of 1934 to October, 1935.

The Court: I know, but the fire was later than that, not the fire, but——

Mr. Wright: This conversation occurred in 1934 and '35.

The Court: Read the question.

(Preceding question read.)

Mr. McClennen: That was objected to for other reasons. That is not what he had stated.

The Court: Anyway, he didn't say they negotiated deals, there were contemplated deals.

Mr. McClennen: That answer may be stricken then?

The Court: Yes.

By Mr. Wright:

Q. Mr. Warne, was there any other reason given to you by any of the representatives of R.K.O., Loew's, Warner and Fox at any time for not selling you a second-run, other than the fact that they were contemplating a deal with Schine?

Mr. McClennen: That is objected to.

The Court: Overruled.

The Witness: Shall I answer that?

The Court: "Yes," or "No."

The Witness: No other reasons given.

Q. I believe you testified on cross-examination Mr. Hal-
[fol. 2378] ligan sold you some R.K.O. short subjects?

A. Yes, sir.

Q. Do you remember when that was?

A. I would say that was the 1935-36 season, but just what part of that season it was, I am not sure, although I would say it was the first part of that season.

Q. When was it with reference to the time you had this conversation with Mr. Halligan about admission prices?

A. Long after.

Q. Was there anything said at the time he made that deal with you for the short subjects about feature product?

A. Yes, I asked him about feature products.

Q. What did he say?

Mr. McClennen: Just a minute.

The Court: Why don't you ask him what was said?

Mr. Wright: That is what I asked him.

The Court: No, you asked him about the short subjects.

Q. What was it you said to him about feature products?

A. I asked Mr. Halligan again about feature product; this was an additional time. When I asked him about feature product Mr. Halligan said he wasn't quite ready to sell me that feature product but he had some short subjects.

The Court: When was this?

The Witness: This was, I would say, in the fall of 1935, but he told me while he did not have feature product to sell [fol. 2379] me just at that time he would like to sell me short subjects. I talked with him and we jollied along.

Mr. McClennen: May that go out?

The Court: Yes.

The Witness: About——

The Court: No, just give the conversation.

The Witness: It was along the same line. I wanted to buy features, and he wanted to sell me short subjects. He eventually sold me short subjects, and I never did get the features.

Mr. Wright: That is all.

Mr. McClennen: That is all.

Mr. Clagett: Your Honor, before we go on with the next witness I would like a five-minute recess. I have a few contracts here I believe we could mark and identify on the record and dispose of that.

The Court: You could do that during intermission.

Mr. Wright: That is right, with regard to the next witness, Mr. Fenybessy, whose examination was interrupted.

The Court: I didn't know if there was some question by the defendants about the authenticity.

Mr. Wright: These were some additional contracts when [fol. 2380] he was on the stand before.

The Court: Do you want to examine him?

Mr. Clagett: No, sir, I wanted to get these marked. I believe we can agree on the basis of the method on which we handled these before.

Mr. McClennen: These are all from the distributors' files?

Mr. Clagett: That is right.

Mr. McClennen: This is now not for identification, but it is offered in evidence.

Mr. Clagett: In evidence.

Mr. McClennen: If your Honor please, we can arrange during your Honor's intermission to have these marked and described into the record.

The Court: Do you want to look them over, do you?

Mr. McClennen: I think they look all right.

The Court: What are they marked? What numbers, do they follow consecutive?

Mr. McClennen: These will be consecutive numbers.

Mr. Clagett: These will be consecutive numbers following the last Plaintiff's number.

The Court: They are marked in evidence the same as for identification.

Mr. McClennen: These are not identified.

The Court: He said they were.

Mr. McClennen: There is no identification mark on them. [fol. 2381] Mr. Clagett: I will ask the reporter then if he will mark those in evidence with the next Plaintiff's Exhibit numbers.

The Court: Well, we will suspend for five minutes.

(Short recess.)

(During the short recess 11 film contracts were then marked as Plaintiff's Exhibits 779 to 789, inclusive, in evidence, and during the recess the following proceedings took place):

Mr. Clagett: By agreement with counsel I will now read the description of Plaintiff's Exhibits 779 through 789 in evidence, for the record.

Exhibit 779 is a contract, R.K.O. Distributing Corporation, for feature pictures, Madison Theatre, approved November 30th, 1932.

Exhibit 780 is a contract, R.K.O. Radio Pictures, for the exhibition of feature pictures, Monroe Theatre, 1937-38 season.

Exhibit No. 781 is a contract, R.K.O. Radio Pictures, Inc., for exhibition of feature motion pictures, Madison Theatre, 1937-38 season.

Exhibit No. 782 is a contract, R.K.O. Radio Pictures, [fol. 2382] Inc., for the exhibition of feature motion pictures, Monroe Theatre, 1938-39 season.

Exhibit No. 783 is a contract, R.K.O. Radio Pictures, Inc., for the exhibition of feature motion pictures at Madison Theatre, for the 1938-39 season.

Exhibit No. 784 is a Fox Film Corporation contract for the exhibition of motion pictures at the Madison Theatre dated November 11th, 1931.

Exhibit No. 785 is a contract, Loew's, Inc., for the exhibition of feature pictures, Monroe Theatre, 1936-37 season.

Exhibit No. 786 is a contract, Warner Brothers and First National pictures, for the exhibition of feature motion pictures, Madison Theatre, approved November 7th, 1936.

Exhibit No. 787 is a contract, Warner Brothers and First

National productions, for the exhibition of feature motion pictures, Monroe Theatre, dated November 5, 1936.

Exhibit No. 788 is a contract, Warner Brothers product, for the exhibition of feature motion pictures, Monroe [fol. 2383] Theatre, dated January 30th, 1935.

Exhibit No. 789 is a contract, First National production for the exhibition of feature motion pictures, Monroe Theatre, dated January 30th, 1935.

[fol. 2384] CHESTER FENYVESSY, recalled as a witness in behalf of the Government, having been previously sworn, was examined and testified further as follows:

Mr. Clagett: The next Plaintiff's exhibits, your Honor, offered in evidence are a series of eleven additional contracts, which were obtained from the five major producers and they have been marked from 779——

The Court: I thought you said 799.

Mr. Clagett: That was misread. From 779 through 789.

(The series of eleven contracts referred to were received in evidence and marked Plaintiff's Exhibits 779 to 789, inclusive.)

Mr. Clagett: I want to refer to the clearance provisions of only two sets of these contracts, Plaintiff's Exhibits 788 and 789, being Warner Bros. and First National Productions' contracts, both of them approved January 30, 1935. The clearance provision is as follows: "After Schine's protection to be made available for dating fourteen days after first booking at any one of the following theatres, Schine's [fol. 2385] Riviera, Liberty, State or Dixie."

The Court: Fourteen days after?

Mr. Clagett: Fourteen days. The next exhibits, Plaintiff's Exhibits 786 and 787 being Warner and First National Productions, both of them approved November 5, 1936, clearance provision as follows: "After Schine protection clear of Webster Theatre."

Direct examination.

By Mr. Clagett:

Q. Can you state, Mr. Fenyvessy, whether the provision after Schine protection would include the four Schine houses, Riviera, Liberty, Dixie and State?

A. Yes.

The Court: How much was the Schine protection?

The Witness: Fourteen days after those houses.

Q. You think the clearance on this contract, approved November 5, 1936, was 14 days, the same as the first contracts I read from?

A. I think so, yes.

Mr. McClennen: The witness stated earlier fourteen days after the first booking, which would be the booking at the Riviera.

[fol. 2386] By Mr. Clagett:

Q. Mr. Fenyvessy, will you say whether you attempted to buy an earlier availibility of pictures of Metro-Goldwyn-Mayer for the Madison and Monroe Theatres?

A. Yes.

Mr. Clagett: Your Honor, I wish to read from the plaintiff's Exhibits which are a series of letters passing between Mr. Fenyvessy and certain sales executives of Loew's.

The Court: Aren't they marked in evidence?

Mr. Clagett: These have been marked in evidence.

Mr. McClennen: Your Honor admitted them over our objection and of course the reading is over our objection.

The Court: Yes.

Mr. Clagett: Plaintiff's Exhibit 765, a letter, dated April 9, 1937, signed by Chester Fenyvessy, to Mr. William F. Rodgers, Loew's, Inc., New York City. "Dear Mr. Rogers: We are operating two theatres, the Madison and Monroe, which are equal in class to the other neighborhood theatres where your pictures are shown second-run, and only after 21 days are the pictures made available to us. [fol. 2387] The Madison and Monroe Theatres are each more than two miles away from the nearest of these second-run houses and are in entirely different neighborhoods. We should like your consideration of open booking with these houses and will pay the same price. We have been endeavoring to secure this without any definite satisfaction through your Buffalo office. Yesterday we discussed our situation with Mr. O'Shea, and he agrees that we should be entitled to open booking. Will you be kind enough to investigate this situation and advise us on the subject at your earliest convenience."

Mr. McClennen: The recital by the witness of a conversation with Mr. O'Shea we ask be so limited that this statement does not constitute any evidence of the fact stated.

The Court: See what follows. I don't know. There may be something to show the authority here.

Mr. McClennen: To make perfectly clear the basis of our objection, at times, of course, a communication may be admissible as a communication, and we understand that [fol. 2388] if hearsay comes in without objection that it may constitute evidence of the facts stated, and we make the objection so that even if it is received as a communication it shall be received as no evidence of the fact that is stated in the discussion or letter.

By Mr. Clagett:

Q. Mr. Fenyvessy, can you state whether you had the conversation referred to in Plaintiff's Exhibit 765 with Mr. O'Shea?

A. Yes.

Q. Who was Mr. O'Shea?

A. At that time I think he was the district manager for Metro.

Q. What did you say to Mr. O'Shea?

Mr. McClennen: Same objection.

A. In substance, that we would like to secure second-run and open booking with those Schine houses.

Q. What did Mr. O'Shea say?

A. That they had a contract with Schine and they would—after it terminated they would give it consideration.

Q. Did he make any reference to the question of open booking?

A. Well, it was discussed, because that was what we were [fol. 2389] anxious to have.

Mr. Clagett: The next exhibit that I shall read is Plaintiff's Exhibit 766.

Mr. McClennen: Same objection.

Mr. Clagett: It is a letter signed by T. J. Connors on the stationery of Metro-Goldwyn-Mayer pictures, to Mr. Chester Fenyvessy, Fenyvessy Enterprises, Rochester, N. Y., dated May 14, 1937. "Dear Mr. Fenyvessy: Mr. Rodgers has referred your letter of April 9th to the writer. I withheld replying until I could have an opportunity of

discussing the matter of your letter with our Buffalo manager, Mr. O'Shea, and our district manager, Mr. Flynn. We are giving your problem consideration and in the near future Mr. O'Shea will again contact you as it relates to our new season's product."

By Mr. Clagett:

Q. Does that letter, Mr. Fenyvessy, refresh your recollection as to whether Mr. O'Shea was the district manager at that time or the Buffalo branch manager?

A. Well, obviously, he was the branch manager at that time. At one time he was branch manager and another [fol. 2390] time he was district manager.

Q. He did become district manager later on?

A. Yes.

Mr. Clagett: The next letter is Plaintiff's Exhibit 767, on the stationery of Metro-Goldwyn-Mayer, signed by William F. Rodgers, General Sales Manager, dated June 27, 1938, to Mr. C. A. Fenyvessy. "My dear Mr. Fenyvessy: We gratefully acknowledge receipt of your application for our 1938-1939 product and are pleased to inform you of its acceptance, and at the same time express our appreciation for your consideration. It is our sincere hope that you will enjoy a profitable season, that you may have a full measure of good health, and that your patrons will continue to be pleased with our efforts.

"Again thanking you for your patronage, we are."

The next letter is Plaintiff's Exhibit 768, dated June 28, 1938, signed by Chester Fenyvessy, to Mr. William F. Rodgers, Metro-Goldwyn-Mayer, New York City.

Mr. McClennen: Same objection.

[fol. 2391] Mr. Clagett: "Dear Mr. Rodgers: On January 31st., at the O'Shea-Maw dinner, I renewed your acquaintance of twenty-odd years ago in Albany. Your letter of June 27th, acknowledging our contract for Metro-Goldwyn product for 1938-1939 is indeed very cordial. So much so that I should like to know whether you will not give the proposition of improving our availability at the Madison and Monroe theatres, which we took up with you a couple of years ago, further consideration. We have two fine houses, in sections definitely isolated from the Schine situation, but, through custom that has been in operation for

several years, it has become a tradition that we must follow Schine. Mr. O'Shea is familiar with our condition in this situation and if you really wish us to "enjoy a profitable season and full measure of good health" (your quotation) and to increase your participation in percentage pictures, an improvement in our availability will go further to accomplish this than anything else."

[fol. 2392] The next letter is Plaintiff's Exhibit 769, on the stationery of Metro-Goldwyn-Mayer Pictures, dated July 5, 1938. It appears to be signed by Mr. Rodgers, at least it has the initials "W.F.R." "Mr. Chester Fenyvessy. Dear Mr. Fenyvessy: Thank you for your letter of June 28th. The subject is one which is under the jurisdiction of Mr. Connors, and he will take it up with Mr. O'Shea, and you will hear direct from either one of those gentlemen regarding the matter. With best wishes."

The next letter is Plaintiff's Exhibit 770, on the stationery of Metro-Goldwyn-Mayer, signed by T. J. Connors, dated July 15, 1938, to Mr. Chester Fenyvessy. "Dear Mr. Fenyvessy: This will acknowledge receipt of your letter of June 28th, addressed to Mr. Rodgers. We have a term deal with the Schine Theatres which grants clearance over your Madison and Monroe theatres and therefore are not in a position to grant earlier availability. We, however, shall [fol. 2393] use our good offices to make an endeavor to secure earlier availability for you."

The next exhibit is Plaintiff's Exhibit 771, a letter signed by Chester Fenyvessy, dated July 30, 1938, to Metro-Goldwyn-Mayer pictures, New York City, attention T. J. Connors. "Dear Mr. Connors: Your letter of July 15th is acknowledged. I do not understand what you mean by 'term deal' with Schine Theatres. I would appreciate your explaining this expression. I have been told at various times that deals with the Schine Theatres precluded discussion of our problem at the Madison and Monroe theatres, and when they expired a year hence our problem would be given consideration, but our situation is still as acute as ever. In fact, slightly worse, because the clearance granted Schine has gradually been extended. We have a situation which might interest you in Rochester, between the Arnett [fol. 2394] operated by others, and the West End, operated by ourselves. Metro will not give us any protection over the Arnett, nor the Arnett over us. In other words, these

houses are obliged to play day and date, although they are on the same street, less than a mile apart. We should like to know why these houses, which are undeniably competitive, are treated in this manner when the four Schine theatres, located in entirely different sections of Rochester, so remote from the Madison and Monroe theatres that there would be no competition if the pictures were shown simultaneously in the Schine theatres and the Madison and Monroe, are given protection over the Madison and Monroe. It appears to us that this is an unfair practice and decidedly discriminatory. We should very much appreciate hearing from you on the subject."

The next letter is Plaintiff's Exhibit 772, a letter on the stationery of Metro-Goldwyn-Mayer Pictures, signed by [fol. 2395] T. J. Connors, dated August 4, 1938. "Mr. Chester Fenyvessy, Fenyvessy Enterprises. Dear Mr. Fenyvessy: This will acknowledge receipt of your letter of July 30th, in which you stated that you would appreciate an explanation of the meaning of 'term deal.' I use that expression when I refer to a deal that covers a period of two seasons or more, in order to distinguish it from the regular type of one-year deal. That part of your letter which refers to the Arnett and West End situation in Rochester I have referred to Mr. O'Shea, District Manager in charge of that territory, as he is intimately familiar with the situation, having been branch manager of the Buffalo territory for many years. You will hear from Mr. O'Shea further regarding the above."

The next exhibit is Plaintiff's Exhibit 774, a letter on the stationery of Metro-Goldwyn-Mayer, signed by Ted O'Shea, dated August 11, 1938, to Mr. Chester Fenyvessy. "Dear [fol. 2396] Chester: Mr. Connors has requested me to investigate and write you concerning your inquiry as to clearance on the West End Theatre, Rochester, to the Arnett Theatre, Rochester. As you know, clearance has never been granted in this situation from one house to the other and these two houses have always been sold on open availability which apparently has always been satisfactory to all concerned. In fact, our product has been sold to both of these theatres for the season 1938-1939 on the same basis."

[fol. 2397] Mr. Clagett: The next letter is Plaintiff's Exhibit 755, signed by Chester Fenyvessy, dated August

16, 1938, to Mr. E. K. O'Shea, Metro-Goldwyn-Mayer Pictures, New York City.

"Dear Mr. O'Shea:

Your communication of August 11th is at hand, and I thank you for your early reply; however, I do not seem to have made my problem clear.

There is no complaint now, nor has there ever been, regarding the clearance at the West End vs. the Arnett Theatre as far as we are concerned. I only cited that situation as an instance where the distributor is entirely fair with both exhibitors, allowing neither one nor the other an advantage in any way. This is in contrast to the Schine situation vs. Monroe and Madison where the distributor is showing preference by supplying the pictures to the four Schine houses ahead of the Madison and Monroe, with what appears to us to be unreasonable protection after their run.

Originally Schine Theatres were obliged to play Metro [fol. 2398] pictures within a period of 14 days, and if not so played, there was no further protection, and they became available to the Madison and Monroe. Now it is usually 21 to 28 days after the last Schine showing before the pictures can be shown at our theatres.

I do not want to annoy you or Messrs. Connors and Rodgers with our problems unnecessarily. I feel that our situation is one that requires more than casual observation, as it has been consistently growing worse through the advantages given Schine. When you consider the West End-Arnett as an example of fair impartial treatment, certainly the Schine-Madison-Monroe protection and clearance is a direct indication that the producer is playing with the big exhibitor and imposing a hardship on the little operator.

I hope you have a remedy, and I shall await your reply.

Very truly yours, Chester Fenyvessy."

The next letter if Plaintiff's Exhibit 777, which is a letter [fol. 2399] signed "Chester Fenyvessy," dated October 25th, 1938, to Mr. T. J. Connors, Metro-Goldwyn-Mayer Pictures, New York City.

"Dear Mr. Connors: During July we had some correspondence with you regarding your protection at the Madison and Monroe Theatres.

As nothing has developed, and our position is the same as before, we would appreciate hearing from you on the subject. We do not want this matter to dry up if there is any possible way of being assisted by you.

Very truly yours, Chester Fenyvessy."

The next letter is Plaintiff's Exhibit 778, a letter on Metro-Goldwyn-Mayer stationery, signed T. J. Connors, dated October 26th, 1938, to Mr. Chester Fenyvessy.

"My dear Mr. Fenyvessy: This will acknowledge receipt of your letter of October 25th.

Under date of July 15th, and again under date of August 4th, we advised you that the existing clearance was part of [fol. 2400] a term deal and that we were not in a position to make any change at this time.

We also advised you that we had requested our District Manager, Mr. E. K. O'Shea, who is intimately familiar with Rochester, to see you at his earliest convenience and discuss the matter. It is my understanding that Mr. O'Shea called upon you and discussed the matter.

You may be sure that we are keeping the matter in mind.

Sincerely, (Signed) T. J. Connors."

The next letter is Plaintiff's Exhibit 773, a letter from Mr. Chester Fenyvessy, dated August 3, 1938, to Mr. Ralph Maw, Metro-Goldwyn-Mayer, Buffalo, New York:

"Dear Mr. Maw:

Re—Clearance Schine vs. Madison-Monroe Theatres

Here is a hypothetical case——

A Metro pictures opens August 7th at the Riviera Theatre, and opens August 14th at the Liberty Theatre, the last day of this engagement being August 16th. Under the [fol. 2401] Madison-Monroe contract, Schine has 14 days clearance, which would make the picture available on August 31st. However, as certain pictures are designated by the distributors as Sunday attractions, in this case the picture would not be available for the Madison and Monroe Theatres until September 14th, which is 28 days from the opening date at Schine's Riviera Theatre.

We should like to know whether this was your intention in drawing up the contract.

Very truly yours, Chester Fenyvessy."